TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 166.

WALTER S. McMICHAEL, LILLIAN M. HARRIS, LULA F. McGEE, ET AL., PLAINTIFFS IN ERROR AND APPELLANTS,

vs.

SAMUEL MURPHY, LOUISA MURPHY, HIS WIFE, FERDINAND BATCHELDER, ET AL.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED JANUARY 3, 1904.

(19,183.)

(19,183.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 166.

WALTER S. McMICHAEL, LILLIAN M. HARRIS, LULA F. McGEE, ET AL., PLAINTIFFS IN ERROR AND APPELLANTS,

vs.

SAMUEL MURPHY, LOUISA MURPHY, HIS WIFE, FERDINAND BATCHELDER, ET AL.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

INDEX.

	Original.	Print.
Citation on writ of error and service on J. H. Everest	1	1
Citation on writ of error and service on C. W. Ransom	3	2
Petition for order allowing writ of error	5	4
Assignment of error	7	5
Affidavits showing amount in controversy	11	8
Writ of error and service on J. H. Everest	15	11
Writ of error and service on C. W. Ransom	17	13
Citation on appeal and service on J. H. Everest	19	15
Citation on appeal and service on C. W. Ransom	21	16
Petition for order allowing appeal	23	18
Assignment of error	25	19
Order granting appeal	29	22
Petition in error	31	23

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 3, 1904.

	Original.	Print
Exhibit A—Transcript from district court for Oklahoma county.	33	25
Petition	33	25
Addition of exhibits to petition	65	45
Exhibit A—Complaint in White *vs.* McMichael	66	46
B—Answer in White *vs.* McMichael	68	47
C—Verdict in White *vs.* McMichael	69	48
D—Judgment in White *vs.* McMichael	70	48
E—Petition in Murphy *vs.* McMichael	72	50
F—Verdict in Murphy *vs.* McMichael	75	51
G—Judgment in Murphy *vs.* McMichael	76	52
Motion for restraining order	79	53
Motion to require plaintiff to file exhibits	80	54
Demurrer	81	55
Motion to strike demurrer	82	55
Judgment	83	56
Clerk's certificate	85	57
Journal entry of submission	87	57
Motion to resubmit cause	88	58
Order denying motion to resubmit cause	90	59
Motion to revive	91	59
Order granting motion to revive	94	61
Judgment	95	61
Opinion	96	62
Motion to revive	101	69
Order reviving cause	104	71
Certificate of clerk	106	72

1 In the Supreme Court of the United States.

WALTER S. McMICHAEL, LILLIAN M. HARRIS, and LULA F. McGEE, Adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael, and Bertha McMichael, Minors, by Their Next Friend, Henry W. Throckmorton, Heirs at Law of William T. McMichael, Deceased, and Laura F. McMichael, Deceased, Plaintiffs in Error,

vs.

SAMUEL MURPHY and LOUISA MURPHY, His Wife; Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, and M. A. O'Brien, Sheriff of Oklahoma County, Territory of Oklahoma, Defendants in Error.

} Citation.

The United States of America to Samuel Murphy, Louisa Murphy, his wife: Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, sheriff of Oklahoma county, Territory of Oklahoma, defendants in error, and J. H. Everest, their attorney of record:

You are hereby cited and admonished to be and appear at the city of Washington on the 7th day of January next in pursu-
2 ance to writ of error in the clerk's office of the supreme court of the Territory of Oklahoma, wherein Walter S. McMichael, Lillian M. Harris and Lula F. McGee, adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael and Bertha McMichael, minors, by their next friend, Henry W. Throckmorton, heirs at law of William T. McMichael, deceased, and Laura F. McMichael, deceased, are plaintiffs in error, and you, the said Samuel Murphy, Louisa Murphy, his wife, Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, sheriff of Oklahoma county, Territory of Oklahoma, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error by the supreme court of the Territory of Oklahoma, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Bayard T. Hainer, justice of the supreme

court of the Territory of Oklahoma, this 8th day of December, A D. 1903.

BAYARD T. HAINER,
Associate Justice of the Supreme Court of Oklahoma Territory.

I hereby accept service of the within and foregoing citation in error and enter my general appearance for the defendant- this 10th day of December, 1903.

J. H. EVEREST,
Attorney of Record for the Defendants, to wit, for Samuel Murphy and Louisa Murphy, His Wife; Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, Sheriff of Oklahoma County, Territory of Oklahoma, Defendants in Error.

[Endorsed:] 1164. McMichael *vs.* Murphy Citation Filed Dec. 11 1903 Benj. F. Hegler, clerk supreme court, by —— ——, deputy.

3 In the Supreme Court of the United States.

WALTER S. MCMICHAEL, LILLIAN M. HARRIS, and Lula F. McGee, Adults, and James F. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael, and Bertha McMichael, Minors, by Their Next Friend, Henry W. Throckmorton, Heirs at Law of William T. McMichael, Deceased, and Laura F. McMichael, Deceased, Plaintiffs in Error,

vs.

SAMUEL MURPHY and LOUISA MURPHY, His Wife; Ferdinand Bachelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, Sheriff of Oklahoma County, Territory of Oklahoma, Defendants in Error.

} Citation.

The United States of America to Samuel Murphy, Louisa Murphy his wife; Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, sheriff of Oklahoma county, Territory of Oklahoma, defendants in error:

You are hereby cited and admonished to be and appear at the city of Washington on the 7th day of January, next, in pursuance

4 to writ of error in the clerk's office of the supreme court of the Territory of Oklahoma, wherein, Walter S. McMichael, Lillian M. Harris and Lula F. McGee, adults and James W. McMichael, Effie L. McMichael, William F. McMichael, and Maude McMichael and Bertha McMichael, minors, by their next friend, Henry W. Throckmorton, heirs at law of William T. McMichael, deceased and Laura F. McMichael, deceased, are plaintiffs in error, and you the said Samuel Murphy, Louisa Murphy, his wife; Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, sheriff of Oklahoma county, Territory of Oklahoma, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, by the supreme court of the Territory of Oklahoma, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Bayard T. Hainer, associate justice of the supreme court of the Territory of Oklahoma, this—8th day of December—A. D. 1903.

BAYARD T. HAINER,
Associate Justice of the Supreme Court of Oklahoma Territory.

I hereby accept service of the within and foregoing citation for [writ of error?] appeal and enter my general appearance for the defendant, Ferdinand Batchelder this 17th day of December, 1903.

CHAS. W. RANSOM,
Attorney of Record for the Defendant in Error, To wit, for Ferdinand Batchelder.

[Endorsed:] 1164. McMichael *vs.* Murphy. Citation for appeal. Filed Dec. 19 1903. Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, deputy.

5 In the Supreme Court of the Territory of Oklahoma.

WALTER S. McMICHAEL, LILLIAN M. HARRIS, and LULA F. McGee, Adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael, and Bertha McMichael, Minors, by Their Next Friend, Henry W. Throckmorton, Heirs at law of William T. McMichael, Deceased, and Laura F. McMichael, Deceased, Plaintiffs in Error,

vs.

SAMUEL MURPHY, LOUISA MURPHY, His Wife; FERDINAND Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, Willian L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, Sheriff of Oklahoma County, Territory of Oklahoma, Defendants in Error.

Petition for order allowing writ of error from final judgment and decree heretofore entered by the supreme court of the Territory of Oklahoma in this case to the Supreme Court of the United States.

Comes now the plaintiffs in error, Walter S. McMichael Lillian M. Harris, Lula F. McGee, adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael and Bertha McMichael, minors, by their next friend, Henry W. Throck-
6 morton, all of whom are heirs at law of William T. McMichael, deceased, and Laura F. McMichael, deceased, and conceiving themselves aggrieved by the judgment, and the decree made, entered and filed by this court in the above entitled cause, on the second day of September A. D., 1902, whereby, among other things, it was ordered, adjudged and decreed that the judgment of the district court of Oklahoma county, Territory of Oklakoma, sustaining the demurrer of defendants below to the petition of the plaintiffs, and the dismissing said action at plaintiffs' cost be affirmed for the reasons specified in the opinion handed down on said date, and that said defendants in error recover of these plaintiffs in error, the costs of this suit in this court amounting to $— do hereby apply to the court for a writ of error from the said judgment and decree of this court, so entered and filed on the said second day of September, A. D. 1902, to the Supreme Court of the United States for the reasons, and upon the grounds specified in the assignment of errors filed herewith, and made a part hereof, and they pray that the writ of error may be allowed, and that a transcript of the record, papers and proceedings, upon which said judgment and decree was made, duly authenticated may be sent to the Supreme Court of the United States, as provided by law, and the rules of said court, and

that such other and further order may be made in the premises, as required by the rules of practice in such cases.

FRANK CLARK,
MILTON H. BRYAN,
JOHN L. McATEE,
JOHN S. HUNTER,
Attorneys for the Plaintiffs in Error.

JOS. K. McCAMMON,
JAS. H. HAYDEN,
Of Counsel for Pl'ffs in Error.

Endorsed: 1164. McMichael *vs.* Murphy. Petition for order allowing writ of error. Filed. Dec. 9, 1903. Benj. F. Hegler, clerk supreme court.

7 In the Supreme Court of the Territory of Oklahoma.

WALTER S. McMICHAEL, LILLIAN M. HARRIS, and LULA F. McGee, Adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael, and Bertha McMichael, Minors, by Their Next Friend, Henry W. Throckmorton, Heirs at Law of William T. McMichael, Deceased, and Laura F. McMichael, Deceased, Plaintiffs in Error,

vs.

SAMUEL MURPHY, LOUISA MURPHY, His Wife; FERDINAND Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, Sheriff of Oklahoma County, Territory of Oklahoma, Defendants in Error.

Assignment of Errors in the Supreme Court of the United States.

Now comes the above named plaintiffs in error by their attorneys at law, Frank Clark, Milton Bryan, John L. McAtee and John S. Hunter, and say that in the record and proceedings of the cause aforesaid there is manifest error in this to-wit:—

First. The supreme court of the Territory of Oklahoma erred in holding and deciding that: "Applying these decisions which
8 this court must regard as final and authoritative to the case at bar, it follows that White's homestead entry was *prima facie* valid; that its invalidity had to be determined by a competent tribunal, and that tribunal was the Land Department of the United States, and so long as White's entry remained uncancelled of record it segregated the tract of land from the mass of the public domain, and precluded McMichael from acquiring an inceptive right thereto by virtue of his alleged settlement."

Second. The supreme court of the Territory of Oklahoma erred in holding and deciding that William T. McMichael, the homestead settler, "was a mere intruder, a naked unlawful trespasser; and no right, either in law or equity can be founded thereon. Being a mere trespasser, White had the undoubted right to eject him from said land. McMichael being a mere intruder, and a trespasser, he is precluded from saying that he was deprived of any right by reason of his ejectment by the military at the instance of White."

Third. The supreme court of the Territory of Oklahoma, erred in holding and deciding that: "This court will presume that Captain D. F. Stiles, who was in command of the military forces in Oklahoma City at that time acted rightfully and for the purpose of preserving the public peace."

Fourth. The supreme court of the Territory of Oklahoma, erred in holding and deciding that the homestead entry of Ewers White was *prima facie* valid, and that it had the effect in law to segregate the land in controversy from the public domain.

Fifth. The supreme court of the Territory of Oklahoma, erred in holding and deciding that Ewers White had any right of possession under and by virtue of his alleged homestead entry.

9 Sixth. The supreme court of the Territory of Oklahoma, erred in holding and deciding that the petition of the plaintiffs in error did not state facts sufficient to constitute a cause of action, and that the demurrer of the defendants in error was properly sustained by the district court of Oklahoma county, to the petition of the plaintiffs in error.

Seventh. The supreme court of the Territory of Oklahoma, erred in holding and deciding that the judgment of the district court of Oklahoma county, sustaining the demurrer of the defendants in error to the petition of the plaintiffs in error, was right, and thereby affirming the judgment of the said district court.

Eighth. The supreme court of the Territory of Oklahoma, erred in not holding and deciding that the alleged entry of Ewers White, was absolutely void and of no effect upon the ground that the said White having entered the Territory of Oklahoma, previous to the time fixed by the proclamation of the President of the United States, was forever disqualified to enter, or acquire the land in controversy, or any lands in said Territory.

Ninth. The supreme court of the Territory of Oklahoma, erred in not holding and deciding that the district court of Oklahoma county erred in sustaining the demurrer of the defendants in error to the petition of the plaintiffs in error.

Tenth. The supreme court of the Territory of Oklahoma, erred in not holding and deciding that the said cause should be reversed and remanded to the district court of Oklahoma county, with instructions to over-rule the demurrer of the defendants in error to the petition of the plaintiffs in error, and to require the said defendants in error to answer the said petition.

10 Eleventh. The supreme court of the Territory of Oklahoma erred in affirming the judgment of the district court of Oklahoma county.

Wherefore, the said plaintiffs in error pray that the said judgment of the supreme court of the Territory of Oklahoma be reversed, and said cause remanded with directions to said court to enter a judgment and decree reversing the judgment of the district court of Oklahoma county, and directing said district court of Oklahoma county to over-rule the said demurrer of the defendants in error to the said petition of the plaintiffs in error, and that said judgment of the supreme court of the Territory of Oklahoma herein complained of, may be annulled, and altogether held for nothing, and that the plaintiffs in error may be restored to all things which they have lost by reason of said judgment, and that the errors of the said supreme court of the Territory of Oklahoma may be fully and in all respects corrected.

FRANK CLARK,
MILTON H. BRYAN,
JOHN L. McATEE,
JOHN S. HUNTER,
Attorneys for Plaintiffs in Error.

JOS. K. McCAMMON,
JAS. H. HAYDEN,
Of Counsel for Plaintiffs in Error.

[Endorsed:] 1164. McMichael *et al. v.* Murphy *et al.* Assignment of errors. Filed Dec. 9 1903 Benj. F. Hegler, clerk supreme court. By —— ——, deputy.

11 In the Supreme Court of the Territory of Oklahoma.

WALTER S. McMICHAEL, LILLIAN M. Harris, and Lula F. McGee, Adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael, and Bertha McMichael, Minors, by Their Next Friend, Henry W. Throckmorton, Heirs at Law of William T. McMichael, Deceased, and Laura F. McMichael, Deceased, Plaintiffs in Error,

vs.

SAMUEL MURPHY, LOUISA MURPHY, His Wife; Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, Sheriff of Oklahoma County, Oklahoma Territory, Defendants in Error.

Affidavit Showing Amount in Controversy.

John L. McAtee, of lawful age, being first duly sworn, according to law, on his oath, says that he is one of the attorneys for the plaintiffs in error in the above stated cause; that he is familiar with the controversy and the issues involved in said cause, and knows the amount at issue and involved therein and of controversy therein, and knows the amount in controversy in said cause, exclusive of costs, to exceed the sum of five thousand dollars, and to be about the sum of fifty thousand dollars, that being the reasonable value of the land, title to which is involved and in controversy in said cause.

JOHN L. McATEE.

12 [SEAL.]

Subscribed and sworn to before me this 21 day of Nov'b'r, A. D. 1903.

H. N. THROCKMORTON,
Notary Public.

My commission ex. May 6—1905.

13 In the Supreme Court of the Territory of Oklahoma.

WALTER S. McMICHAEL, LILLIAN M. Harris, and Lula F. McGee, Adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael, and Bertha McMichael, Minors, by Their Next Friend, Henry W. Throckmorton, Heirs at Law of William T. McMichael, Deceased, and Laura F. McMichael, Deceased, Plaintiffs in Error,

vs.

SAMUEL MURPHY, LOUISA MURPHY, His Wife; Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, Sheriff of Oklahoma County, Oklahoma Territory, Defendants in Error.

Affidavit Showing Amount in Controversy.

John S. Hunter, of lawful age, being first duly sworn, according to law, on his oath, says that he is one of the attorneys for the plaintiffs in error in the above stated cause; that he is familiar with the controversy and the issues involved in said cause, and knows the amount at issue and involved therein and of controversy therein, and knows the amount in controversy in said cause, exclusive of costs, to exceed the sum of five thousand dollars, and to be about the sum of *about* fifty thousand dollars, that being the reasonable value of the land, title to which is involved and in controversy in said cause.

[SEAL.] JOHN S. HUNTER.

Subscribed and sworn to before me this 21 day of Nov. A. D. 1903.

H. N. THROCKMORTON,
Notary Public.

My com. ex. May 6th—1905.

14 In the Supreme Court of the Territory of Oklahoma.

WALTER S. McMICHAEL, LILLIAN M. Harris, and Lula F. McGee, Adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael, and Bertha McMichael, Minors, by Their Next Friend, Henry W. Throckmorton, Heirs at Law of William T. McMichael, Deceased, and Laura F. McMichael, Deceased, Plaintiffs in Error,

vs.

SAMUEL MURPHY, LOUISA MURPHY, His Wife; Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, Sheriff of Oklahoma County, Oklahoma Territory, Defendants in Error.

Affidavit Showing Amount in Controversy.

Henry W. Throckmorton, of lawful age, being first duly sworn, according to law, on his oath, says that he is familiar with the controversy and the issues involved in the above stated cause and knows the amount at issue and involved therein, and of controversy therein, and knows the amount in controversy in said cause, exclusive of costs, to exceed the sum of five thousand dollars, and to be about the sum of fifty thousand dollars, and that being the reasonable value of the land, title to which is involved and in controversy in said cause.

[SEAL.] HENRY W. THROCKMORTON.

Subscribed and sworn to before me this 21st day of Nov. A. D. 1903.

J. J. BEALL,
Notary Public.

My commission expires the 11 day of June 1906.

Endorsed: 1164. Walter S. McMichael *et al.*, plaintiffs in error, *vs.* Samuel Murphy *et al.*, defendants in error. Affidavits showing amount in controversy. Filed Dec. 9, 1903, Benj. F. Hegler, clerk supreme court.

15 In the Supreme Court of the United States of America.

WALTER S. McMICHAEL, LILLIAN M. Harris, and Lula F. McGee, Adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael, and Bertha McMichael, Minors, by Their Next Friend, Henry W. Throckmorton, Heirs at Law of William T. McMichael, Deceased, and Laura F. McMichael, Deceased, Plaintiffs in Error, *vs.* SAMUEL MURPHY and LOUISA MURphy, His Wife; Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, and M. A. O'Brien, Sheriff of Oklahoma County, Territory of Oklahoma, Defendants in Error.	No. 1164. Writ of Error to the Supreme Court of the Territory of Oklahoma.

The President of the United States to the honorable supreme court of the Territory of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, in which the value of the land and the matter in controversy exceeds the sum of five thousand dollars, exclusive of costs, and
16 wherein it appears that the title to and value of the land is involved and brought in question in said cause, manifest error hath happened to the great damage of the said Walter S. McMichael, Lillian M. Harris and Lula F. McGee, adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael and Bertha McMichael, minors, by their next friend, Henry W. Throckmorton, all of whom are heirs at law of William T. McMichael, deceased, and Laura F. McMichael, deceased, and to the benefit and advantage of Samuel Murphy and Louisa Murphy his wife, Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, and M. A. O'Brien, sheriff of Oklahoma county, Territory of Oklahoma, defendants in error, as by the complaint and assignment of error of plaintiffs in error appears, we being willing that error, if

any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States with this writ, so that you have the same at Washington on the 7th day of January, next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States and of said Territory should be done.

Witness the Honorable Bayard T. Hainer, associate justice of the supreme court of the Territory of Oklahoma this 8th day of December A. D. 1903.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk Supreme Court.

Allowed.
BAYARD T. HAINER,
Associate Justice Supreme Court of Oklahoma.

16½ [Endorsed:] 1164. In the Supreme Court of the United States. Walter S. McMichael *et als.*, plaintiffs in error, *vs.* Samuel Murphy *et als.*, defendants in error. Writ of error. Filed Dec. 11 1903. Benj. F. Hegler, clerk supreme court. By —— ——, deputy.

I hereby accept service of the within and foregoing writ of error and enter my general appearance for all the defendants except Ferdinand Batchelder, this 10th day of December–1903.

J. H. EVEREST,
Attorney of Record for the Defendants, Towit, for Samuel Murphy and Louisa Murphy, His Wife; Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar C. Lee, M. A. O'Brien, Sheriff of Oklahoma County, Territory of Oklahoma, Defendants in Error.

17 In the Supreme Court of the United States of America.

WALTER S. McMICHAEL, LILLIAN M. Harris and Lula F. McGee, Adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael, and Bertha McMichael, Minors, by Their Next Friend, Henry W. Throckmorton, Heirs at Law of William T. McMichael, Deceased, and Laura F. McMichael, Deceased, Plaintiffs in Error, *vs.* SAMUEL MURPHY and LOUISA MURPHY, His Wife; Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, and M. A. O'Brien, Sheriff of Oklahoma County, Territory of Oklahoma, Defendants in Error.	No. 1164. Writ of Error to the Supreme Court of the Territory of Oklahoma.

The President of the United States to the honorable supreme court of the Territory of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, in which the value of the land and the matter in controversy exceeds the sum of five thousand dollars, exclusive of costs, and wherein it appears that the title to and value of the land is involved and brought in question in said cause, manifest error hath happened to the great damage of the said Walter S. McMichael, Lillian M. Harris,
18 and Lula F. McGee, adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael and Bertha McMichael, minors, by their next friend, Henry W. Throckmorton, all of whom are heirs at law of William T. McMichael, deceased, and Laura F. McMichael, deceased, and to the benefit and advantage of Samuel Murphy and Louisa Murphy his wife, Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, and M. A. O'Brien, sheriff of Oklahoma county, Territory of Oklahoma, defendants in error, as by the complaint and assignment of error of plaintiffs in error appears, we being willing that error, if any hath

been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States with this writ, so that you have the same at Washington on the 7th day of January next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States and of said Territory should be done.

Witness the Honorable Bayard T. Hainer associate justice of the supreme court of the Territory of Oklahoma, this 8th day of December A. D. 1903.

BENJAMIN F. HEGLER,
Clerk Supreme Court.

Allowed:

BAYARD T. HAINER,
Associate Justice Supreme Court, Oklahoma.

[Endorsed:] 1164. In the Supreme Court of the United States. Walter S. McMichael, *et als.* plaintiffs in error, *vs.* Samuel Murphy, *et als.* defendants in error. Writ of error. Filed Dec. 23 1903 Benj. F. Hegler clerk supreme court. By Jessie Pardoe deputy.

I hereby accept service of the within and foregoing writ of error, and enter my general appearance for the defendant, Ferdinand Batchelder, this 18th day of December 1903.

CHAS. W. RANSOM,
Attorney of Record for the Defendants, to wit, for Ferdinand Batchelder, Defendant in Error.

19 In the Supreme Court of the United States.

WALTER S. MCMICHAEL, LILLIAN M. HARRIS, and LULA F. McGEE, Adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael, and Bertha McMichael, Minors, by Their Next Friend, Henry W. Throckmorton, Heirs at Law of William T. McMichael, Deceased, and Laura F. McMichael, Deceased, Plaintiffs in Error,

vs.

SAMUEL MURPHY and LOUISA MURPHY, His Wife; Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, and M. A. O'Brien, Sheriff of Oklahoma County, Territory of Oklahoma, Defendants in Error.

} Citation.

The United States of America to Samuel Murphy, Louisa Murphy, his wife; Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, sheriff of Oklahoma county, Territory of Oklahoma, defendants in error, and J. H. Everest, their attorney of record:

You are hereby cited and admonished to be and appear at the city of Washington on the 7th day of January next, in pur-
20 suance to an appeal in the clerk's office of the supreme court of the Territory of Oklahoma, wherein Walter S. McMichael, Lillian M. Harris and Lula F. McGee, adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael and Bertha McMichael, minors, by their next friend, Henry W. Throckmorton, heirs at law of William T. McMichael, deceased, and Laura F. McMichael, deceased, are plaintiffs in error, and you the said Samuel Murphy, Louisa Murphy his wife, Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, sheriff of Oklahoma county, Territory of Oklahoma, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error by the supreme court of the Territory of Oklahoma, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Bayard T. Hainer, associate justice of the supreme court of the Territory of Oklahoma, this 8th day of December A. D. 1903.

BAYARD T. HAINER,
Associate Justice of the Supreme Court of Oklahoma Territory.

I hereby accept service of the within and foregoing citation for appeal, and enter my general appearance for the defendant, this 10th day of December, 1903.

J. H. EVEREST,
Attorney of Record for the Defendants, to wit, for Samuel Murphy and Louisa Murphy, His Wife; Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, Sheriff of Oklahoma County, Territory of Oklahoma, Defendants in Error.

[Endorsed:] In the Supreme Court of the United States. Walter S. McMichael *et als.*, plaintiffs in error *vs.* Samuel Murphy *et als.*, defendants in error Citation Filed Dec. 11 1903 Benj. F. Hegler, clerk supreme court. By —— —— deputy.

21 In the Supreme Court of the United States.

WALTER S. McMICHAEL, LILLIAN M. HARRIS, and LULA F. McGee, Adults, and James F. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael, and Bertha McMichael, Minors, by Their Next Friend, Henry Throckmorton, Heirs at Law of William T. McMichael, Deceased, and Laura F. McMichael, Deceased, Plaintiffs in Error,

vs.

SAMUEL MURPHY and LOUISA MURPHY, His Wife; FERdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, Sheriff of Oklahoma County, Territory of Oklahoma, Defendants in Error.

} Citation.

The United States of America to Samuel Murphy, Louisa Murphy, his wife; Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, sheriff of Oklahoma county, Territory of Oklahoma, defendants in error:

You are hereby cited and admonished to be and appear at the city of Washington on the 7th day of January, next, in pur-
22 suance to an appeal in the clerk's office of the supreme court of the Territory of Oklahoma, wherein Walter S. McMichael, Lillian M. Harris, and Lula F. McGee, adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude Mc-

Michael and Bertha McMichael, minors, by their next friend, Henry W. Throckmorton, heirs at law of William T. McMichael, deceased, and Laura F. McMichael, deceased, are plaintiffs in error, and you, the said Samuel Murphy and Louisa Murphy, his wife, Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, sheriff of Oklahoma county, Territory of Oklahoma, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, by the supreme court of the Territory of Oklahoma, as in the said writ of appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Bayard T. Hainer, associate justice of the supreme court of the Territory of Oklahoma, this 8th day of December A. D. 1903.

BAYARD T. HAINER,
Associate Justice of the Supreme Court of Oklahoma Territory.

I hereby accept service of the within and foregoing citation for appeal and enter my general appearance for the defendant, Ferdinand Batchelder, this 17th day of December, 1903.

CHAS. W. RANSOM,
Attorney of Record for Defendant in Error, towit, for Ferdinand Batchelder.

[Endorsed:] 1164. McMichael *vs.* Murphy. Citation for appeal. Filed Dec. 19 1903 Benj. F. Hegler clerk supreme court. By Jessie Pardoe deputy.

23 In the Supreme Court of the Territory of Oklahoma.

WALTER S. McMICHAEL, LILLIAN M. HARRIS, and LULA F. McGee, Adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael, and Bertha McMichael, Minors, by Their Next Friend, Henry W. Throckmorton, Heirs at Law of William T. McMichael, Deceased, and Laura F. McMichael, Deceased, Plaintiffs in Error,

vs.

SAMUEL MURPHY, LOUISA MURPHY, His Wife; FERDINAND Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, Sheriff of Oklahoma County, Territory of Oklahoma, Defendants in Error.

Petition for order allowing appeal from final judgment and decree heretofore entered by the supreme court of the Territory of Oklahoma in this case to the Supreme Court of the United States.

Come now the plaintiffs in error, Walter S. McMichael, Lillian M. Harris, Lula F. McGee, adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael and Bertha McMichael, minors, by their next friend, Henry W. Throckmorton, all of whom are heirs at law of William T. McMichael, de-
24 ceased, and Laura F. McMichael, deceased, and conceiving themselves aggrieved by the judgment and the decree made, entered and filed by this court in the above entitled cause on the second day of September A. D. 1902, whereby, among other things, it was ordered, adjudged and decreed that the judgment of the district court of Oklahoma county, Territory of Oklahoma, sustaining the demurrer of defendants below to the petition of the plaintiffs, and the dismissing said action at plaintiffs' cost be affirmed for the reasons specified in the opinion handed down on said date, and that said defendants in error recover of these plaintiffs in error, the costs of this suit in this court amounting to $—, do hereby appeal from the said judgment and decree of this court, so entered and filed on the said second day of September A. D. 1902, to the Supreme Court of the United States, for the reasons and upon the grounds specified in the assignment of errors filed herewith and made a part hereof, and they pray that this appeal may be allowed, and that a transcript of the record, papers and proceedings, upon which said judgment and decree was made, duly authenticated may be sent to the Supreme Court of the United States, as provided by law, and the rules of said court, and that such other and further order may be

made in the premises, as required by the rules of practice in such cases.

FRANK CLARK AND
MILTON BRYAN,
JOHN L. McATEE AND
JOHN S. HUNTER,
Attorneys for Plaintiffs in Error.

JOS. K. McCAMMON,
JAS. H. HAYDEN,
Of Counsel.

Endorsed: 1164—In the supreme court of the Territory of Oklahoma. Walter S. McMichael *et al. vs.* Samuel Murphy *et al.* Petition for appeal to the Supreme Court of the United States. Filed Dec. 9, 1903. Benj. F. Hegler, clerk supreme court.

25 In the Supreme Court of the Territory of Oklahoma.

WALTER S. McMICHAEL, LILLIAN M. HARRIS, and LULA F. McGEE, Adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael, and Bertha McMichael, Minors, by Their Next Friend, Henry W. Throckmorton, Heirs at Law of William T. McMichael, Deceased, and Laura F. McMichael, Deceased, Plaintiffs in Error,

vs.

SAMUEL MURPHY, LOUISA MURPHY, His Wife; FERDINAND Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, Sheriff of Oklahoma County, Territory of Oklahoma, Defendants in Error.

Assignment of Errors in the Supreme Court of the United States.

Now come the above named plaintiffs in error by their attorneys at law, Frank Clark, Milton Bryan, John L. McAtee and John S. Hunter, and say that in the record and proceedings of the cause aforesaid there is manifest error in this to-wit:—

First. The supreme court of the Territory of Oklahoma erred in holding and deciding that: "Applying these decisions which
26 this court must regard as final and authoritative to the case at bar, it follows that White's homestead entry was *prima facie* valid; that its invalidity had to be determined by a competent tribunal, and that tribunal was the Land Department of the United States, and so long as White's entry remained uncancelled of record it segregated the tract of land from the mass of the public domain, and precluded McMichael from acquiring an inceptive right thereto by virtue of his alleged settlement."

Second. The supreme court of the Territory of Oklahoma erred in holding and deciding that William T. McMichael, the homestead settler, " was a mere intruder, a naked unlawful trespasser; and no right, either in law or equity can be founded thereon. Being a mere trespasser, White had the undoubted right to eject him from said land. McMichael being a mere intruder, and a trespasser, he is precluded from saying that he was deprived of any right by reason of his ejectment by the military at the instance of White."

Third. The supreme court of the Territory of Oklahoma, erred in holding and deciding that: " This court will presume that Captain D. F. Stiles, who was in command of the military forces in Oklahoma City at that time acted rightfully and for the purpose of preserving the public peace."

Fourth. The supreme court of the Territory of Oklahoma, erred in holding and deciding that the homestead entry of Ewers White was *prima facie* valid and that it had the effect in law to segregate the land in controversy from the public domain.

Fifth. The supreme court of the Territory of Oklahoma, erred in holding and deciding that Ewers White had any right of possession under and by virtue of his alleged homestead entry.

27 Sixth. The supreme court of the Territory of Oklahoma, erred in holding and deciding that the petition of the plaintiffs in error did not state facts sufficient to constitute a cause of action, and that the demurrer of the defendants in error was properly sustained by the district court of Oklahoma county, to the petition of the plaintiffs in error.

Seventh. The supreme court of the Territory of Oklahoma, erred in holding and deciding that the judgment of the district court of Oklahoma county, sustaining the demurrer of the defendants in error to the petition of the plaintiffs in error, was right, and thereby affirming the judgment of the said district court.

Eighth. The supreme court of the Territory of Oklahoma, erred in not holding and deciding that the alleged entry of Ewers White, was absolutely void and of no effect upon the ground that the said White having entered the Territory of Oklahoma, previous to the time fixed by the proclamation of the President of the United States, was forever disqualified to enter, or acquire the land in controversy, or any lands in said Territory.

Ninth. The supreme court of the Territory of Oklahoma, erred in not holding and deciding that the district court of Oklahoma county erred in sustaining the demurrer of the defendants in error to the petition of the plaintiffs in error.

Tenth. The supreme court of the Territory of Oklahoma, erred in not holding and deciding that the said cause should be reversed and remanded to the district court of Oklahoma county, with instructions to over-rule the demurrer of the defendants in error to the petition of the plaintiffs in error, and to require the said defendants in error to answer the said petition.

28 Eleventh. The supreme court of the Territory of Oklahoma erred in affirming the judgment of the district court of Oklahoma county.

Wherefore, the said plaintiffs in error pray that the said judgment of the supreme court of the Territory of Oklahoma be reversed, and said cause remanded with directions to said court to enter a judgment and decree reversing the judgment of the district court of Oklahoma county, and directing said district court of Oklahoma county to over-rule the said demurrer of the defendants in error to the said petition of the plaintiffs in error, and that said judgment of the supreme court of the Territory of Oklahoma herein complained of, may be annulled, and altogether held for nothing, and that the plaintiffs in error may be restored to all things which they have lost by reason of said judgment, and that the errors of the said supreme court of the Territory of Oklahoma may be fully and in all respects corrected.

FRANK CLARK,
MILTON BRYAN,
JOHN L. McATEE, AND
JOHN S. HUNTER,
Attorneys for Plaintiffs in Error.

JOS. K. McCAMMON,
JAS. H. HAYDEN,
Of Counsel.

[Endorsed:] 1164. In the supreme court of the Territory of Oklahoma. Walter S. McMichael *et als.*, plaintiffs in error *vs.* Samuel Murphy *et als.* defendants in error. Assignment of errors in Supreme Court of the United States. Filed Dec. 9, 1903. Benj. F. Hegler, clerk supreme court, by —— ——, deputy.

29 In the Supreme Court of the Territory of Oklahoma.

WALTER S. McMICHAEL, LILLIAN M. Harris, and Lula F. McGee, Adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael, and Bertha McMichael, Minors, by Their Next Friend, Henry W. Throckmorton, Heirs at Law of William T. McMichael, Deceased, and Laura F. McMichael, Deceased, Plaintiffs in Error,

vs.

SAMUEL MURPHY, LOUISA MURPHY, His Wife; Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, M. A. O'Brien, Sheriff of Oklahoma County, Territory of Oklahoma, Defendants in Error.

Order Granting Appeal.

Now on this 8th day of December, A. D. 1903, come Frank Clark, Milton Bryan, John L. McAtee and John S. Hunter, solicitors for the plaintiffs in error, and present to the Honorable Bayard T. Hainer, associate justice of the supreme court of Oklahoma, the application and petition of the plaintiffs in error for an appeal to the Supreme Court of the United States from the judgment and decree rendered in this court on the 2nd day of September, A. D. 1902, affirming the judgment of the district court of Oklahoma county, in this cause.

30 And plaintiffs in error having filed with said application and petition for appeal their assignment of errors and presented said application in open court, it is found that the value of the property in controversy exceeds the sum of five thousand dollars, exclusive of costs, and that this is a proper case for appeal to the Supreme Court of the United States, and it is ordered that the said appeal to the Supreme Court of the United States be, and the same is hereby granted, and the clerk of this court is hereby directed to certify a full, true and correct transcript of the record of this court to the Supreme Court of the United States; and that an undertaking with good and sufficient security, in the sum of two hundred dollars to be approved by this court or one of the judges thereof, be given by the appellants, within twenty days from this date, that they shall prosecute their appeal to affect, and if they fail to make their plea good, shall answer all costs and the chief justice of this

court or one of the associate justices thereof, is further directed to attest and sign the citation in said cause on such appeal.

BAYARD T. HAINER,
Associate Justice of the Supreme Court of Oklahoma Territory.

Endorsed: 1164. Walter S. McMichael *et als.*, plaintiffs in error. *vs.* Samuel Murphy *et als.*, defendants in error. Order granting appeal. Filed Dec. 9, 1903. Benj. F. Hegler, clerk supreme court.

31 In the Supreme Court of the Territory of Oklahoma.

WILLIAM T. MCMICHAEL, Plaintiff in Error, *vs.* SAMUEL MURPHY and LOUISA MURPHY, His Wife; Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, and M. A. O'Brien, Sheriff of Oklahoma County, Territory of Oklahoma, Defendants in Error.	Case No. 3015. Petition in Error.

The said William T. McMichael, plaintiff in error, complains of Samuel Murphy and Louisa Murphy, his wife, Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee and M. A. O'Brien, sheriff of Oklahoma county, Territory of Oklahoma, the defendants in error, for that the said defendants at the September term, A. D. 1901, of the district court of the third judicial district of the Territory of Oklahoma, in and for Oklahoma county, recovered a judgment by the consideration of said court against the said William T. McMichael, in a certain action then pending in the said court, wherein said William T. McMichael was plaintiff, and the said Samuel Murphy and Louisa Murphy, his wife, Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee and M. A. O'Brien, sheriff of Oklahoma county, Territory of Oklahoma, were defendants. The complete transcript of the record in said cause duly certified and attested and showing all the proceedings had therein in said district court is hereto attached and hereby made a part hereof and marked "Exhibit A," and the said William T. McMichael avers that there is error in said record and proceedings in this, to wit:

32 First. That said court erred in sustaining the motion of the defendants requiring the plaintiff to attach to his original

petition as exhibits, copies of the judgments at law sought to be restrained in and by said petition.

Second. That said court erred in sustaining the second ground of the demurrer of the defendants to the petition of the plaintiff.

Third. That said court erred in rendering a judgment for the defendants and against the plaintiff on the said pleadings.

Fourth. That said court erred in sustaining the second ground of defendants' demurrer to plaintiff's petition for the reason alleged in said ground of demurrer, viz: "That said petition wholly fails to state facts sufficient to constitute any cause of action against the defendants or any of them."

Fifth. That said court erred in not holding as matter of law that plaintiff's petition did not state a good and sufficient cause of action which entitled him to a hearing upon the merits.

To all of which said rulings, decisions and findings of the said district court the plaintiff in error did then and there except and still excepts.

Wherefore, for the errors herein stated, the plaintiff in error prays that said judgment so rendered may be reversed, set aside and for naught held, and that a judgment may be ordered to be rendered in favor of the plaintiff in error, and against the defendants in error upon the questions of law raised, set out and found in said pleadings and that the plaintiff in error be restored to all rights that he has lost by the making of such decisions and the rendition of said judgment and for such further relief herein as may to the court seem just, equitable and proper.

WILLIAM T. McMICHAEL,
Plaintiff in Error,
By CLARK & BRYAN,
His Attorneys.

Filed: Nov. 30, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

33 Said petition in error is endorsed as follows: Case No. 3015—In the supreme court of the Territory of Oklahoma—William T. McMichael, *vs.* Samuel Murphy *et al.*—Petition in error.

EXHIBIT A.

In the District Court, Third District of Oklahoma Territory, in and for Oklahoma County.

WILLIAM T. McMICHAEL, Plaintiff,
v.
SAMUEL MURPHY and LOUISA MURPHY, His Wife; FERDINAND BATCHELDER, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, and M. A. O'Brien, Sheriff of Oklahoma County, in Oklahoma Territory, Defendants. } Petition.

To the Honorable B. F. Burwell, judge of the district court, third district of Oklahoma Territory, in and for Oklahoma county:

The plaintiff, William T. McMichael, brings this his suit against Samuel Murphy and Louisa Murphy, his wife, Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, and M. A. O'Brien, sheriff of Oklahoma county, Oklahoma Territory, the defendants, and respectfully represents as follows:

The plaintiff, William T. McMichael, respectfully represents, that he is a native born American citizen, forty nine (49) years of age, and has a wife and eight children dependent upon him for support and maintenance; that during the year 1888, plaintiff was living with his family in the Chickasaw nation, Indian Territory, and when by act of Congress the present Territory of Oklahoma was to be opened to citizens of the United States for settlement thereon, this plaintiff being desirous of securing for himself and family a homestead under the laws of the United States, where he might the better pro-
34 vide for their care and support and the education of his children, determined to avail himself of the offer generously made by the United States Government to give to each actual *bona fide* settler one hundred and sixty acres of land, or quarter section, under the terms prescribed by Congress, under the act opening same for settlement, and under the further terms prescribed in the proclamation of the President of the United States, issued on the 23rd day of March, A. D. 1889, in pursuance of the act of Congress of March 2, 1889, and with this end in view the plaintiff came into the territory so to be opened to settlement, on the 2nd day of May, A. D. 1889, which was some ten days after noon of the 22nd day of April, A. D. 1889, when by the act of Congress before mentioned, and the proclamation of the President, the said territory came open to settlement under the homestead laws of the United States; that plain-

tiff acted in strict accord with and obedience to the afore mentioned act of Congress, and the proclamation of the President, both with reference to the time of his coming into the territory, and also with reference to all the acts that will be hereinafter detailed, relative to his settlement upon a homestead and his efforts to secure title thereto; that on the 28th day of May A. D. 1889, the plaintiff with his wife and children, together with certain cattle, horses, cooking utensils, household goods, and, in fact, everything that he owned went upon the southwest quarter (¼) of section twenty-seven (27) in township twelve (12) north of range three (3) west, I. M., in Oklahoma county, Oklahoma Territory, and then and there declared it to be his intention to claim the said described land as a homestead, and gave notice of such intention on the 3rd day of June following, by posting upon said land a notice to whomsoever it might concern that plaintiff claimed said described land as a homestead under the laws of the United States relating to homesteads upon public lands; that previous to the settlement upon said land as aforesaid by the plaintiff, to-wit: on the 23rd day of April, A. D. 1889, one Ewers White filed in the local land office at Guthrie, Oklahoma
35 Territory, entry No. 6, wherein and whereby he, the said Ewers White, undertook to enter said land as a homestead for himself; that on the 24th day of April, A. D. 1889, one Charley J. Blanchard likewise attempted to make homestead entry for the same tract of land, by a filing presented by him at the local land office at Guthrie, Oklahoma Territory, wherein and whereby he, the said Blanchard, attempted to claim the said land as a homestead for himself; that on the 1st day of May, A. D. 1889, one Vestal S. Cook, attempted to make entry of the said land as a homestead for himself, at the local land office at Guthrie, Oklahoma Territory, by filing his application therefor; that on the 27th day of April, A. D. 1889, the said Blancard filed in the local land office at Guthrie, Oklahoma Territory, an affidavit attacking the entry made by the said White, upon the ground that the said Ewers White, in violation of the act of Congress of March 2, 1889, and in defiance of the proclamation of the President of the United States, issued March 23, A. D. 1889, had entered the territory so opened to settlement prior to noon of the 22nd day of April, A. D. 1889, and was, therefore, disqualified from ever entering or securing a homestead in said territory, or acquiring any right or title thereto; that on the 1st day of May, A. D. 1889, the said Vestal S. Cook also filed in the local land office at Guthrie, Oklahoma Territory, his affidavit of contest as against the right of either the said White or the said Blanchard, upon the ground that both of the said applicants had entered the territory that had been so opened to settlement as aforesaid in violation of the act of Congress of March 2, A. D. 1889, and in defiance of the proclamation of the President of the United States of March 23, 1889, before noon of the 22nd day of April, A. D. 1889, and that therefore and in consequence thereof, neither the said White nor the said Blanchard could ever secure title to or secure any right

whatsoever in or to any of the lands in said territory; that on the 16th day of July, A. D. 1889, the contest case, so made as between White, Blanchard and Cook, came on to be heard before the register & receiver of the local land office for said territory, situate at Guthrie, Oklahoma Territory, in which said trial
36 each party charged that the other two had entered the Territory of Oklahoma, prior to 12 o'clock m. of April 22, A. D. 1889, in violation of the law and the President's proclamation; that upon said trial of said contest the local land officers recommended the canceling of White's entry and dismissed the contest of both Cook and Blanchard, and that this decision was reached late in the afternoon of Saturday, the 19th day of July, A. D. 1889; that the contest case so decided as aforesaid was thereupon appealed to the office of the Commissioner of the General Land Office, where the same coming on to be heard on the 7th day of March, A. D. 1890, was on that date affirmed by the said Commissioner of the General Land Office; that on further appeal by the parties at interest to the Secretary of the Interior and the case coming on to be heard before that officer on the 21st day of July, A. D. 1891, the said decision of the said local land office, so affirmed by the Commissioner of the General Land Office, was likewise affirmed by the honorable Secretary of the Interior; that on the 21st day of July, A. D. 1889, after the above decision of the local land office had been rendered at Guthrie, Oklahoma Territory, and two days after the rendition of said decision, this plaintiff, William T. McMichael, appeared in person at the local land office, at Guthrie, Oklahoma Territory, and then and there made formal, legal application to enter said tract of land, upon which he had previously settled as before described, and tendered to the local land officers the necessary and proper fees therefor, and, although his application was regular, and although he had complied and offered to comply with every requirement of law in that behalf, the said application so to enter said described land was, by the local land officers aforesaid, rejected; that on the 31st day of August, A. D. 1889, the plaintiff, William T. McMichael, again appeared in person at the local office at Guthrie, Oklahoma Territory, and then and there again tendered to said local land officers his application to enter as a homestead the said described land, and then and there tendered to the said local land officers all the necessary
37 legal fees exacted by the law, and then and there offered to comply with any requirement of the law necessary or proper to be complied with, in order to secure for himself as a homestead the land hereinbefore described and that this application to enter said land was received by the local land officers, and marked suspended, pending final action on the contest case of White, Blanchard and Cook, then pending on appeal; that on the same 31st day of August, A. D. 1889, and at the time that the plaintiff made the application and tendered the fees above referred to, he also tendered to the local land officers his affidavit, contesting the right of either White, Blanchard or Cook to the said land, charging in said affi-

davit that each and every one of them were disqualified as homestead applicants, for the reason that each and every one of them had entered the Territory of Oklahoma prior to the 22nd day of April, A. D. 1889, and subsequent to the 23rd day of March, A. D. 1889 in direct violation of the act of Congress and of the proclamation of the President, in that behalf; that on the 11th day of March A. D. 1890, one Levi Holt, through an agent, filed in the local land office at Guthrie, Oklahoma Territory, a soldier's declaratory statement, claiming the land hereinbefore described, which said soldier's declaratory statement was suspended, pending final action on the contest case of White, Blanchard and Cook, which was then pending before the Land Department on appeal; that on the 2nd day of August, A. D. 1889, while the contest case of White, Blanchard and Cook was pending on appeal before the Commissioner of the General Land Office, and after the local land officers at Guthrie, Oklahoma Territory, had decided as a matter of law, that neither White, Blanchard or Cook could ever acquire any interest whatsoever, under the law, in said described land, and while the plaintiff was peacefully residing upon said land with his family, having made settlement thereupon in accordance with the law, and having declared his intention to acquire the said described land as a homestead in accordance with the law, and having made application in strict compliance with the law,

38 to enter the said described land as a homestead, the said Ewers White who had openly violated the act of Congress, and had bid defiance to the proclamation of the President of the United States, procured the assistance of one D. F. Stiles who at that time was a captain in the regular Army of the United States, and who assumed to act at Oklahoma City, near which place the land in controversy is, as a provost marshal, and having secured the assistance of the said Stiles to aid him in his nefarious purpose of procuring said land in violation of law, the said Stiles, at the behest of the said White, came upon the said described land on the said 2nd day of August, A. D. 1889, with an armed body of soldiers, and unlawfully, forcibly, and without the consent of the plaintiff, placed the plaintiff, who had violated no law, under arrest, took charge of his wife, his children and his property, and by force of arms, and not even under color of law, conducted the plaintiff, his family and their belongings from the said described property and threatened them with violence if they ever sought to go upon the said described land again. The plaintiff charges that these acts upon the part of the said Stiles, and the soldiers in his command, were part and parcel of a conspiracy entered into between the said Stiles and the said Ewers White to cheat and defraud the plaintiff, to over-ride the act of Congress, trample under foot the proclamation of the President, and to set at naught every principle of justice and right, and to secure for themselves this property without a shade of right or title thereto, in law, equity or morals; that plaintiff had resided continuously upon said land in open possession thereof, from the 28th day of

May, A. D. 1889, until the 2nd day of August, A. D. 1889, when he was so arbitrarily and forcibly ejected therefrom, and that since the 2nd day of August, A. D. 1889, until the 30th day of November, A. D. 1890, representing the period during which the plaintiff personally was restrained from taking possession of the said described land, by the violent threats of the said Ewers White to do him bodily injury, which said threats were made upon numer-
39 ous occasions, and which the plaintiff is abundantly able to prove, and by the arbitrary conduct of the said D. F. Stiles who assumed to himself by virtue of his military position the powers of a court, claiming authority to pass upon the rights of contesting applicants for homesteads in this section of Oklahoma Territory, but that during such period the plaintiff, in fact, did claim possession of the said land, and was in the actual possession thereof, in that he used the greater portion of the same, keeping his stock, consisting of horses and cattle, thereon at all times, and asserting on every occasion, openly and notoriously, that he did claim the said property as a homestead, and the plaintiff never at any time, by act or deed, indicated any intention upon his part, either to abandon his claim to said land as a homestead, or his right to the possession thereof; that on the 1st day of January, A. D. 1890, the plaintiff went upon the said described tract of land, and carried thereupon a large quantity of lumber and other building material, and then and there proceeded to erect a residence for himself and family, and did build a foundation and erect a frame thereupon, and that when the plaintiff left late in the evening of said day, he left said house in that condition, viz: the frame erected upon a foundation of sills and sleepers, and that when he returned the following morning, he was informed by responsible persons whom he met on the way, that the said Ewers White had knocked down the frame of the house so erected, and had completely destroyed all of the lumber and other building material which the plaintiff had left there, and the plaintiff was further informed by the responsible persons referred to, that the said Ewers White had declared it to be his intention to kill the plaintiff, if the said plaintiff came back upon said land, and the plaintiff was further informed as to the desperate character of the said White, and believed that if he did go upon the said land, the said White, if opportunity offered, would unquestionably assassinate him, and plaintiff investigated the statements made by his informants, both as to the destruction
40 of the property and threats made by the said White, and found that they were both true; that on the 28th day of November, A. D. 1890, while the contest case of White, Blanchard and Cook, having been decided adversely to all three of them, both by the local land officers and the Commissioner of the General Land Office, was then pending on appeal before the honorable Secretary of the Interior, and while the applications of the plaintiff to enter said land were pending, and while the plaintiff was claiming said land, by virtue of his homestead settlement, and subsequent to the filing

of plaintiff's affidavit contesting and denying the right of either White, Blanchard or Cook to enter said land, the said Ewers White, well knowing that he had violated the act of Congress of March 2, 1889, and the President's proclamation of March 23, 1889, by coming into the territory previous to noon of the 22nd day of April, A. D. 1889, and well knowing that in his application to enter said land, wherein he swore that he had not so done, that he had committed perjury, and well knowing that under the law he had absolutely no right whatever to said land or any of the public land in said territory, and well knowing that the plaintiff was the only person who did, under the law, have a right to the said described land, the said Ewers White did enter into a conspiracy with one Samuel Murphy who is made a party defendant herein, which said conspiracy had for its purpose the evasion of the act of Congress and the nullification of the President's proclamation, and the defrauding of this plaintiff of his rights in the premises, and which conspiracy was to the effect that the said Ewers White should relinquish his fraudulent and void entry of said land, and that simultaneously therewith the said Samuel Murphy should enter said described land, secure title thereto, and convey to the said White a large portion thereof, and thus enable the said White, by perjury and fraud, to acquire title to a portion of said land, although the act of Congress opening the same to settlement, emphatically declared that persons in like circumstances should never acquire any title to any portion of
41 said land; that in pursuance of said conspiracy so formed as aforesaid by the said Murphy and White, and participated therein by other defendants herein, the said Ewers White did on the 28th day of November A. D. 1890, relinquish his fraudulent and void entry, and simultaneously with the filing of such relinquishment, the said Samuel Murphy filed in the local land office his application to enter said described land as a homestead, which said application was accepted by the local land office and placed of record. Plaintiff charges that the action of the local land officers in permitting said Samuel Murphy to enter said land as a homestead was an illegal act, and a fraud upon the right of the plaintiff in the premises, because in addition to his prior settlement rights, his two applications to enter said land should have been recognized and his entry should have been put upon the property the moment the contesting applicants were out of the way; that on the morning of the 30th day of November, A. D. 1889, the plaintiff with his entire family and all of his belonging went back upon the said described real estate and has been there in open and notorious possession of he same from that day until the filing of this petition, and is still in such open and notorious possession; that during all these years he has labored early and late to build for himself and family a home, and so improve same as that he could easily support and maintain his family and give his children such education and other advantages as he could afford; that to this end he has erected a dwelling

house and barn, dug a well sixty-eight feet deep, and has raised an orchard of peach, apple, pear, apricot, plum and cherry trees, containing about thirteen hundred (1300) trees, now in full bearing, has cultivated and raised a vineyard of fine grapes, covering about one half acre, and has constantly been cultivating about thirty acres of said land in corn, wheat, millet, potatoes and other vegetables, and has been using a large portion of said land for pasturage purposes, and has fenced a considerable portion of the same, and in fact, has expended a great deal of time and labor, both
42 by himself, and other members of his family thereon, and has expended a great many dollars of his earnings in adding to the value of said described property; that plaintiff is a farmer by profession and has never been engaged in any other pursuit, and every act that he has committed and every step that he has taken in connection with the said described tract of land has been solely for the purpose of legally acquiring title, in order that he might follow thereupon his business of farming, and provide a comfortable home for his family; that plaintiff has taken no step with a view of securing said property for townsite or speculative purposes, but solely for the purpose of acquiring one hundred and sixty acres of land for agricultural purposes. The plaintiff charges in this connection that there have been no improvement- put upon said property, other than one or two small houses, save that put there by the plaintiff, and that none of the persons who ever asserted any claim or right to the property in question in these contests have ever planted a tree or cultivated an acre of said land, or produced therefrom any crop of any description whatsoever.

Plaintiff avers, that again on December 4, 1890, he tendered to the local land officers an application to enter said land, together with legal fees, and the same was refused, and that from such action he appealed.

That on the 21st day of July, A. D. 1891, the said contest case of White, Blanchard and Cook came on to be heard before the honorable Secretary of the Interior, and that on that day the honorable Secretary rendered a decision affirming the decision of the Commissioner of the General Land Office, and thus holding that neither Cook nor Blanchard were qualified entrymen, and no decision as to White, he having relinquished prior to that time; that at the time of the rendition of this decision of the Secretary of the Interior, the plaintiff, William T. McMichael, was in the open and notorious possession of the said described tract of land, and that the application
43 to enter tendered by him July 21, 1889, the application to enter by him tendered August 31, 1889, and his affidavit of contest filed August 31, 1889, his application to enter filed December 4th, 1890, were all then pending before the Land Department of the Government; that in the decision of the questions involved, the honorable Secretary of the Interior rendered his said decision, on the 25th day of February, A. D. 1895, and declared and found the following to be the facts, viz: "April 23, 1889, Ewers White made home-

stead entry No. 6, for said tract. April 24, 1889, Charley J. Blanchard made homestead application for the same tract. May 1, 1889, Vestal S. Cook made homestead application for the land. The application of Blanchard and Cook were rejected because of White's entry. April 27, 1889, Blanchard filed an affidavit of contest, attacking White's entry. May 1, 1889, Cook also filed an affidavit of contest. July 16, 1889, the cause went to trial, each party charging that the other two had entered the Territory of Oklahoma prior to 12 o'clock m. of April 22, 1889, in violation of the law and the President's proclamation. The local officers recommended the cancelling of White's entry, and dismissed the contest of both Cook and Blanchard. On appeal, your office on March 7, 1890, affirmed this decision, and on further appeal this department, on July 21, 1891, (13 L. D. 68) affirmed your office's decision as to Cook and Blanchard, White, pending appeal here, having filed his relinquishment, November 29, 1890. Your office letter of August 15, 1891, transmitted notice of said departmental decision to the local land office, with the advice that the case was closed, White's entry cancelled, and the tract opened to the first legal applicant. Subsequently, on September 11, 1891, on further examination of the record, it was discovered that, while the case of Blanchard *versus* White, *et al.*, was pending on appeal, an affidavit of contest against White's entry had been filed by one Charles Renfro, based on the same charge made by the other parties, with the additional charge that for the reasons urged against White, neither Blanchard nor Cook

44 — qualified entrymen. That on July 22, 1889, one Johnson M. Fuller had filed an affidavit of contest against White's entry, on substantially the same charges. That on August 31, 1889, William T. McMichael filed an affidavit, alleging that he had made settlement on the land June 3, 1889, had lived thereon in a tent with his family until August 2, 1889, when he was ejected therefrom by the military at the instance of White. That his rights were superior to those of White, Blanchard or Cook, all of whom were disqualified by reason of having entered the Territory during the prohibited period, and that the rights of Renfro and Fuller were junior to his. That he made application to enter said tract July 19, 1889, which application was rejected because it conflicted with White's entry. That he was the only qualified settler on the tract entitled to make entry thereon, and he protested against any other persons being permitted to enter the land.—January 1, 1890, Renfro made application to enter the land, and on its rejection he appealed to your office. March 11, 1890, Levi Holt, through an agent filed a soldier's declaratory statement for the land, which was suspended, pending final action on the case of Blanchard *vs.* White *et al.*, and on November 29, 1890, White's entry was cancelled on his relinquishment, and this defendant was permitted to make homestead entry, No. 223, as stated; White's relinquishment was filed on Saturday. On the following morning, bright and early, this plaintiff was on the land with his family and has resided there ever since. On December 4, 1890, the plaintiff filed another application to enter said

land, it having been learned that his former application did not correctly describe the land. It was rejected for conflicting with defendant's entry. Plaintiff appealed, alleging that defendant's entry was wrongful, in that he, with others, had conspired to have the defendant enter said land in order to plat it as an addition to Oklahoma City, and reaffirmed his prior right by virtue of his settlements, as above set forth, and alleged that White's relinquishment was the result of his protest and contest.

45 Your office, September 11, 1891, by letter "H," dismissed the decision of Renfro and Fuller, rejected Holt's application, and ordered a hearing between this plaintiff and defendant. That hearing was had February 15, 1892, before the local land office, both parties being present in person and by attorney. The local office decided adversely to the plaintiff, who appealed to your office, which, on January 18, 1893, affirmed the decision of the local land office. From that decision the plaintiff has appealed here. Renfro and Fuller having failed to appeal from the decision against them are eliminated from the case.

Your office's decision of January 18, 1893, closed the case as to Holt, on the ground that he had not been notified of your office's decision of September 11, 1891, and had failed to appeal therefrom.

Since McMichael's appeal has reached this department from your office's decision of January 18, 1893, the appeal of Holt from your office's decision of September 11, 1891, has been forwarded here. It appears that it was regularly filed in due time, and that the delay in its transmission here was due to the inadvertance and negligence of the local land office in allowing it to become misplaced among the papers there. Said appeal was duly served on both McMichael and Murphy, so that the controversy became a three cornered one between McMichael, Murphy and Holt.

McMichael based his claim upon his alleged settlement on the tract in May or June, 1889, while it was covered by White's homestead entry; that White, Blanchard and Cook were all disqualified by reason of having entered the Territory during the prohibited period; that White's entry was therefore void; McMichael the first qualified settler on the tract, and that White's relinquishment was filed because of his protest affidavit, filed in August, 1889, and that Murphy's entry is void because in violation of rule of practice No. 53.

Holt based his claim on his application filed March 11, 1890, four days after the decision of your office, holding White's entry for cancellation, and before appeal was taken therefrom.

46 Murphy's claim is based solely on his entry, made November 29, 1890, on the filing of White's relinquishment.

Although White had entered the Oklahoma country during the prohibited period, yet his homestead entry was *prima facie* valid, its invalidity had to be established by extraneous evidence and a judgment as to its illegality pronounced by a competent tribunal. Had that never been done the tract covered by said entry would have remained forever segregated from the public domain; so far at

least as the unquestioned legality of the entry itself could accomplish that fact, hence it cannot be regarded as void but voidable only. If voidable only, White's entry segregated the land so long as it remained of record. Hence he was entitled to its possession, it being exempt from further settlement or entry, until his entry was cancelled or declared forfeited.

McMichael's settlement on the tract in question in May or June, 1889, while it was covered by the homestead entry of White gave him no rights whatever as against either White or the Government. McMichael was not on the tract when White's entry was cancelled. He cannot be heard to say that he was deprived of any right on account of his ejectment by White because he had none to lose. He was a trespasser on the tract and White had a right to eject him therefrom.

Hence he can acquire no right whatever by virtue of his alleged settlement. Had White permitted him to remain on the tract, and had he been residing there when White's entry was cancelled a different question would be presented. When White therefore filed his relinquishment November 29, 1890, McMichael had no right or legal claim whatever to said tract, unless that relinquishment was caused by McMichael's protest filed August 31, 1889, which would have entitled him to the preference right of entry. This brings us to the examination of that question.

The protest I have examined with care. It was filed not long after the local land office had held White's entry for cancel-
47 lation and refers to that fact, it sets forth the entire history of said tract from the opening of the Territory down to the date said instrument was filed. It declares the entry of White to be void, and the claim of Blanchard and Cook of no effect for the reasons hereinbefore stated. It asserts that McMichael's claim to the land is paramount to all others by reason of his settlement as above set forth. It recites the ejectment of McMichael from said tract by the military at the instigation of White, and that he is kept off of said tract by White's threats and intimidations. After giving an account of the rejection of McMichael's application to make homestead entry on July 19, 1889, it stated that affiant herewith tendered his application and affidavit to enter said land as a part of this protest, and now asks that when said entry of White be cancelled, that they be received and filed by the United States land office, and a cetificate be issued to him by the receiver. He then protests against any other person being permitted to enter said land, and requests that if any such attempt is made that a hearing as to affiant's rights be had and that he be awarded the right to enter said land. Such is the instrument which McMichael claims caused White's relinquishment, and entitled him to the preference right of entry as against Murphy. It is an information, a declaration, a protest and a prayer. An information of all the facts and circumstances connected with said grant down to the filing of said affidavit; a declaration of what McMichael conceived to be his legal rights in

the premises: a protest against any invasion, abridgment or subversion of those rights, and a prayer that when White's entry is cancelled—presumably on the contest then pending and in accordance with the decision of the local land office, recently rendered therein—those rights be recognized and established by the acceptance of his application accompanying said affidavit.

It does not pretend to be an affidavit of contest. Its charges against White's entry are based on the decision of the local
48 office in the contest of Blanchard and Cook against White then pending. No hearing is asked to prove the charges against White's entry and no steps were ever taken on that affidavit to secure the cancellation of White's entry. A hearing is asked only in the event that any one, other than McMichael, seeks to enter the land, and then only for the purpose of establishing his prior right by virtue of his settlement on said tract.

From the language of that affidavit it is apparent that McMichael expected that the decision of the local land office in the contest then pending would be affirmed, White's entry cancelled and the disqualification of Blanchard and Cook established. When that occurred he believed his rights by virtue of his settlement would entitle him to enter said tract as against all others, and he was contented to wait.

Not being an affidavit of contest, nor designed to effect the cancellation of White's entry it is inconceivable how it could confer any rights on its author that he could assert against one claiming under a subsequent relinquishment. The affidavit here is not a contest affidavit it is true. It was filed for the sole purpose of keeping alive McMichael's claim and giving notice thereof to the world. But he is claiming under it the rights and status of a contestant. In view of its character and the purpose for which it was filed, this he cannot do in the light of the decision referred to above.

Hence Murphy's entry is secure as against the claim of McMichael based on his alleged settlement and preference right to entry.

Your office held White's entry for cancellation March 7, 1890. Four days thereafter Holt filed his application to make a soldier's additional homestead entry for said tract. It was received by the local office, but not placed of record, in compliance with the rule above stated. When White's relinquishment was filed on November 29, 1890, that application of Holt's was then pending, and
49 should have been placed of record or the rule enunciated by the authorities above cited is meaningless. It follows therefore that the action of the local land office in allowing Murphy to make entry of the tract instead of placing Holt's application of record was erroneous.

It may be urged that the principle involved in the rule above stated will inure to the benefit of McMichael and give him the prior right by virtue of his application filed with his affidavit of August 31, 1889. But the distinction lies in the fact that the decision of the

local land office is not final, but is subject to the supervision of your office and to its approval or disapproval.

Since the consideration of the motion for review filed by Murphy there has also been filed a motion by McMichael to review said departmental decision of February 25, 1895.

He alleges nine (9) errors in said decision as the basis for his motion for review. He alleges among other things that his application to enter said land was filed in the local land office, that his protest of August 31, 1889, was pending there at the date White filed his relinquishment, and that under the rule laid down in the decision complained of with reference to Holt's application, his application should have been placed of record instead of Holt's, because first filed, and he alleges that the department did not pass upon that point in the decision complained of.

By reference to the last paragraph of that decision it will be seen that the very point here raised was passed on. But it must be added to what is there stated, that his (McMichael's) application to make entry was filed at a time when the tract in question was still segregated by White's entry, and that no rights could be acquired by an application at that time.

Holt's application on the contrary was filed at a time when under the ruling of the department it might be received and held subject to the rights of the entryman on appeal or to the preference rights of the contestant."

50 That, notwithstanding the honorable Secretary of the Interior decided at such hearing that the said Levi Holt had a better right to said land than the defendant Samuel Murphy, yet the said Levi Holt never took any steps whatsoever to secure the said tract of land in question, but simply allowed matters to stand as the decision of the Secretary of the Interior left them, until the 16th day of June, A. D. 1897, the very day on which the defendant Samuel Murphy made his alleged final proof and secured the final receipt, at which time a waiver of all claim to the said property upon the part of the said Levi Holt was filed in the local land office at Oklahoma City, in the Territory of Oklahoma, and the plaintiff charges that this procedure, viz: the filing of the waiver on the part of Holt and the making of final proof on the part of Murphy was the result of a conspiracy and a collusive and unlawful agreement to divide the property which had heretofore been entered into by the representatives of the said Holt on the one part and the said Murphy on the other. And the plaintiff further alleges, that this combination and agreement on the part of the said Holt and the said Murphy were entered into in order to avoid a contest of the right of the said Holt to said tract of land which had been filed by the plaintiff in the local land office at Oklahoma City, Oklahoma Territory, the exact date of the filing of said contest, which the plaintiff alleges was regular in form, under oath, and duly corroborated by competent testimony, is unknown, but that the same was filed within a very short time after the decision made by the honorable Secretary of

the Interior, under date of July 21, 1891, and plaintiff prays reference to the record of the Land Department to said contest affidavit and proof, as often as may be necessary for the purposes of this suit.

That matters as herein above stated so remained until during the spring of 1897, the said Murphy advertised that on the 10th day of May, A. D. 1897, at the United States land office at Oklahoma City, Oklahoma Territory, he would make final proof as a home-
51 stead entryman for the tract of land in question; that on the said 10th day of May, 1897, and at 10 o'clock in the forenoon of said day the plaintiff appeared at the said office with witnesses seeking an opportunity so to do and ready with an abundance of competent proof to establish that fact that the said Samuel Murphy had not complied with the homestead laws with reference thereto; that he had not complied with any of the requirements of the homestead laws, and that he was not in law, equity, or good conscience entitled to be permitted to make final proof as a homestead entryman; that plaintiff remained in and about the land office practically all day and that the said Samuel Murphy did not appear thereat, nor did he undertake to make any proof whatsoever on that day; that plaintiff approached the register and receiver and those officials assured the plaintiff that if Murphy did not appear to offer proof, another day would be fixed for the offering of the same and that the testimony should not be offered or heard except upon the giving to the plaintiff due and ample notice of the time and place; that afterwards, to-wit; on the 20th day of May, A. D. 1897, the said Samuel Murphy and certain witnesses whom he procured to testify for him did appear before the register and receiver at said land office, and did make final proof, and thereafter did receive the final receipt and afterwards a patent from the United States Government for the said described tract of land; plaintiff charges that the said register and receiver did not notify plaintiff of the time and place when such final proof would be made by the said Murphy, but that on the contrary, he charges that the said officials permitted said final proof to be made by stealth without the knowledge of the plaintiff, and purposely arranged matters so that the plaintiff could not be present and controvert the same, and that the said Murphy by perjury and other corrupt means could accomplish his design of fraud upon the Government of the United States, and upon the rights of the plaintiff; that afterwards this plaintiff interviewed one Anton H.
52 Classen, who is a defendant herein, and who was, at the time when said Murphy made his alleged final proof, receiver for the United States land office, at Oklahoma City, Oklahoma Territory, and inquired of the said Classen why he did not keep his promise to advise the plaintiff of the time and place when the said Murphy would submit his final proof, and that the said Classen simply stated to the plaintiff that it was because he was a friend of Murphy; and the plaintiff charges that these acts upon the part of the register and receiver of the land office were the result of a conspiracy entered into by them with the defendant Murphy to cheat and defraud the

plaintiff of his rights in the premises, and to secure title to this land in contravention of the laws of the United States.

In view of the facts herein above recited and aver-ing ability and willingness by competent proof to establish the same, the plaintiff charges, that the relinquishment of the said Ewers White was the result of plaintiff's contest—of August 31, 1889, and the consummation of a fraudulent agreement entered into between him and the defendant Murphy, by the terms of which the said Murphy was to secure title to the tract of land, and convey to the said Ewers White one hundred and twenty (120) acres thereof; that as evidence of this conspiracy the said Samuel Murphy, on the 24th day of January, A. D. 1898, the very date, affiant is informed, that he received his patent from the United States, conveyed to the said Ewers White one hundred and twenty acres of said land, which said deed of conveyance was filed for record and recorded by the register of deeds of Oklahoma county, Oklahoma Territory, on January 25, 1898, at 7:20 o'clock a. m.; that in said deed the consideration is placed at three thousand three hundred fifty dollars ($3,350) but plaintiff charges that the said White did not pay a dollar to the said Murphy and that the only consideration for said deed of any character was the fraudulent agreement so entered into by which the said Ewers White should reap the benefit of his false statements in his
53 application for entry of homestead, and should reap the benefit of his open and flagrant violation and defiance of the laws of his country. That on the 27th day of July, A. D. 1897, and before he had secured patent therefor, the said Samuel Murphy conveyed to one Ferdinand Batchelder, by warranty deed, one hundred and twenty acres which he afterwards conveyed to White as above stated, for the pretended consideration of two thousand dollars ($2,000.00) and this conveyance, the plaintiff charges to be a link in the fraudulent chain to secure title to the tract of land in question, which had been made by Murphy, *et al.*, and that it was absolutely without consideration, null and void, and a fraud upon the rights of the plaintiff.

That on the 13th day of May A. D. 1899, the defendant, Ewers White, by warranty deed, conveyed to the defendant Anton H. Classen, the one hundred and twenty acres of the land in question which had heretofore been conveyed to the said White by the said Murphy, for a pretended consideration of twenty-five hundred dollars ($2500.00) but the plaintiff is informed and believes that there was absolutely no consideration whatever for said conveyance, and that the same was a part and parcel of the unlawful and fraudulent agreement that had been entered into previous to that time by the said White, Classen and Murphy, and that this conveyance had really for its consideration the gross official misconduct of the said Classen, and his deception of the plaintiff, and keeping concealed from the plaintiff the time when and the place where said Samuel Murphy would offer his final proof as a homesteader. Plaintiff further represents that when the said Samuel Murphy did make

final proof of his said homestead entry, to-wit: on the 20th day of May, A. D. 1897, it was made secretly, without the knowledge of the plaintiff, and through the connivance of the local land officials, and that at such times the said Murphy willfully and deliberately filed in said local office proof of improvements and other essential facts that were false and untrue in each and every particular;

54 that the said Murphy set up in said testimony, both in his personal testimony and in the testimony which he procured certain witnesses to give, that he had built or dug upon said land a good and sufficient well of water, whereas, in fact and in truth, the said Murphy had not dug a well upon any portion of said property nor has he since that time dug or caused to be placed upon said land any well of water of any description whatsoever; that in said testimony the said defendant Murphy affirmed that he had placed upon said property a large number of fruit trees and had a goodly portion of said land in cultivation, whereas, in fact, the said Murphy did not have and has never had upon said property any fruit trees of any character whatsoever, nor has he ever cultivated one acre of said described property, and no crops of any description, and therefore the plaintiff charges that the testimony so furnished by the said Murphy in making his alleged final proof, was wilfully and corruptly false, made secretly for the purpose of defrauding the plaintiff and imposing on the officers of the Government having in charge the disposition of the public lands; that although the facts were well known to the local land officers that the improvements described in said alleged final proof were placed on said property by the plaintiff, and not by the said Murphy, the said local officers fraudulently permitted him to make the said proof and thereby aided and abetted the said Murphy in practicing an imposition and gross fraud upon the Commissioner of the General Land Office, and the honorable Secretary of the Interior, who, upon this state of manufactured proof and in ignorance of the true facts, permitted a patent for said land to issue to the said Samuel Murphy.

That subsequent to the 31st day of August, A. D. 1889, and a short time prior to the filing of the relinquishment by the defendant Ewers White, on the 28th day of November, A. D. 1890, the exact date being to the plaintiff unknown, the said Ewers White, conscious of his own illegal acts and realizing that it would be an utter impossibility for him the said Ewers White ever to acquire title to

55 said land, approached the plaintiff, William T. McMichael, and proposed to him that, if the plaintiff would relinquish his claim in and to the land in question, the said White would give the plaintiff one thousand dollars ($1,000) in cash for such relinquishment; that the plaintiff desiring only to comply with the law and to acquire his homestead for himself and family, in a legal way, declined to entertain the unlawful proposal made to him by the said White. Whereupon the said White declared that he, McMichael, should never have the property and that he, White, would find some person with whom he could trade, and relinquish his claim, so that

such other person could enter the land for the joint benefit of himself and the said Ewers White.

Plaintiff charges that each and every one of the unlawful acts of conspiracy, corruption and fraud, and each act of concealment, secrecy and stealth hereinbefore particularly specified, were gross frauds upon the rights of this plaintiff, contrary to the laws of the United States in relation to public land, in defiance of the proclamation of the President of the United States opening land in Oklahoma Territory to settlement, and that by reason of the perpetration of the illegal and fraudulent acts, the officers of the Land Department of the Government were imposed upon, the rights of this plaintiff were abridged, and he was defrauded of title to the said described land, which in law, in equity and good conscience he should have received and which, but for the commission of the illegal and fraudulent acts, the plaintiff, William T. McMichael, would have received.

The plaintiff further represents that the local land officers committed an error of law in refusing the application of the plaintiff to enter said land, which was tendered them on the 21st day of July, A. D. 1889, with all the necessary and legal fees required; that the local land officers committed an error of law in refusing to accept and place of record the applications of the plaintiff, William T. McMichael, to enter said described land tendered on the 31st day of August, A. D. 1889, and Dec. 4, 1890, together with all the
56 legal and necessary fees that could be required of him. And the plaintiff charges that by reason of the commission of said several errors of law on the part of the local land officers, his rights in the premises were jeopardized, and had it not been for such errors of law so committed as aforesaid, patent to the said described land would have been issued to the plaintiff, William T. McMichael, and not to the defendant Murphy.

The plaintiff alleges further, that the honorable Secretary of the Interior, in his decision in the matter of the case involving the claim of the defendant Murphy, the said Levi Holt, and this plaintiff, to the land in question, committed a serious error of law, misconstrued the law, and made a misapplication thereof, when he held that "Although White had entered the Oklahoma country during the prohibited period, yet his homestead entry was *prima facie* valid. Its invalidity had to be established by extraneous evidence and a judgment as to its illegality pronounced by a competent tribunal. Had that never been done the tract covered by said entry would have remained forever segregated from the public domain; so far at least as the unquestioned legality of the entry itself could accomplish that fact. Hence it cannot be regarded as void but voidable only." Whereas the said Secretary of the Interior should have held, that the entry of Ewers White was void *ab initio*, and that being a positive violator of law himself, he could acquire no rights thereunder, in and to that or any other portion of the lands in Oklahoma Territory; that instead of his entry being simply voidable, it was illegal, unlawful, null and void.

That the honorable Secretary committed a serious error of law and misconstrued and misapplied the law, wherein he held as follows: "McMichael's settlement on the tract in question, in May or June, 1889, while it was covered by the homestead entry of White, gave him no rights whatever as against either White or the Government." Whereas the honorable Secretary should have held that McMichael's settlement upon the land initiated his homestead
57 rights to the property and was the highest evidence of his good faith in attempting to acquire a homestead upon the public domain, and that the absolutely void entry of White, who was an open violator of the law, should not be allowed to stand in the way of such initiation of proceedings to secure title to the homestead by a *bona fide* settler.

That the honorable Secretary committed a serious error of law, misconstrued and misapplied the law, when he held that "McMichael was not on the tract when White's entry was cancelled. He cannot be heard to say that he was deprived of any right on account of his ejectment by White, because he had none to lose. He was a trespasser on the tract and White had a right to eject him therefrom." Whereas the honorable Secretary should have held as a matter of law, that White's entry being absolutely void, and McMichael being legitimately upon the land as a *bona fide* settler his ejection therefrom by the military, by force, without any court proceedings, or other legal means, was an outrage upon the personal liberty, and property rights of the citizen, and that his being kept off of the land by threats of personal violence, and by a show of military force, did not militate against his rights in the premises, and that under the law, he was constructively at all times in the possession of the said described land.

That the Secretary of the Interior committed a serious error of law, misconstrued and misapplied the law, when he held in relation to the affidavit of contest, filed by the plaintiff on August 31, 1889, as follows: "Such is the instrument which McMichael claims caused White's relinquishment and entitles him to the preference right of entry as against Murphy. It is an information, a declaration, a protest and a prayer. An information of all the facts and circumstances connected with said grant down to the filing of said affidavit; a declaration of what McMichael conceives to be his legal rights in the premises; a protest against any invasion, abridgment or subversion of those rights; and a prayer that when White's entry
58 is cancelled—presumably on the contest then pending—and in accordance with the decision of the local office recently rendered therein—those rights be recognized and established by the acceptance of the application accompanying said affidavit. It does not pretend to be an affidavit of contest." Whereas, the Secretary of the Interior should have held, that the said affidavit so filed by McMichael on the 31st day of August, A. D. 1889, was in all respects an affidavit of contest and, although same may have been defective in structure, yet it was such an affidavit, stating such facts and de-

claring such rights as under the law entitled the plaintiff to the preference right of entry, if the entries of White, Blanchard and Cook should be cancelled.

That the honorable Secretary committed a serious error of law, misconstrued and misapplied the law, when in relation to the application of Levi Holt to enter said described land, he held as matter of law the following, viz: "When White's relinquishment was made on November 28, 1890, that application of Holt's was pending and should have been placed of record, or the rule enunciated by the authorities above cited is meaningless. It follows, therefore, that the action of the local land office in allowing Murphy to make entry of the tract instead of placing Holt's application of record was erroneous. It may be urged that the principle involved in the ruling above cited will inure to the benefit of McMichael, and give him a prior right by virtue of his application filed with his affidavit of August 31, 1889. But the distinction lies in the fact that the decision of the local office is not final, but is subject to supervision of your office and its approval or disapproval."

Whereas, the honorable Secretary of the Interior should have held that, when White's relinquishment was filed on November 28, 1890, the application of McMichael, of date July 21, 1889, and the application of McMichael, of date August 31, 1889, were both pending and were prior in point of time to the application of Holt or Murphy, and that therefore the application of McMichael should have been placed of record and he should have been entitled
59 to enter said land. The honorable Secretary of the Interior should have held further as a matter of law, that the action of the local land officers is final, unless reversed on appeal by higher authorities, and if such action of the local land officers is affirmed by the appellate officers, that then the judgment or decision takes effect as of the date of its rendition in the local land offices.

That the honorable Secretary of the Interior committed a serious error of law, misconstrued and misapplied the law, when he held that "McMichael's application to make entry was filed at a time when the tract in question was still segregated by White's entry, and that no right could be acquired by the application at that time."

Whereas, the honorable Secretary should have held that White's entry being absolutely null and void, did not operate as a segregation of the land in question. And the honorable Secretary of the Interior, if this view of the law be correct, committed a very serious error of law, according to his own views, when he permitted Holt's entry to be placed of record, as when that application was made, the land in question, according to the honorable Secretary's decision, was segregated by White's entry.

The plaintiff, William T. McMichael, alleges: That by reason of the said several respective errors, misconstructions, and misapplications of the law, herein pointed out on the part of the honorable Secretary of the Interior, his rights as a homestead settler have been abridged, and the said erroneous decisions have operated in law as

a fraud upon the rights of this plaintiff, and that by reason thereof, the defendant, Samuel Murphy, has been permitted unlawfully to secure the legal title to said described tract of land, whereas, if it had not been for the commission of said several errors, misconstructions and misapplications of the law, and the law in the particulars mentioned had been correctly declared, construed and applied, plaintiff, William T. McMichael, would have received the patent from the United States Government to said described tract of land,
60 vesting the legal title in him, as in law, equity and good conscience it should be vested.

The plaintiff further represents, that under and by virtue of the said patent so issued to him, the said Samuel Murphy claimed and now claims title to said described property; that he has conveyed a large portion of the same to other persons who are named as defendants herein, and that the grantees of the said Samuel Murphy now set up and claim title and are attempting to exercise acts of ownership over said described property, under and by virtue of the title so derived from the said Samuel Murphy; that the defendants, Samuel Murphy and Louisa Murphy, his wife, are still claiming ownership of a portion of the said described property, under said patent so fraudulently obtained as aforesaid; that Ferdinand Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land and Oscar G. Lee, each and every one of them who are made parties defendant to this suit, claim to have some title or interest in and to portions of the described tract of land, but such interests, if any exist, were acquired by said defendants, with full knowledge of the rights of the plaintiff therein, and are subject thereto. That the said Samuel Murphy instituted in this honorable court a suit for the possession of said described land and secured a judgment for such possession, upon which said judgment a writ of possession has been issued and placed in the hands of M. A. O'Brien, the sheriff of Oklahoma county, Oklahoma Territory, for service and return; that said Ewers White also brought suit in this honorable court for the possession of a portion of said described tract of land; that he likewise secured a judgment for such possession, upon which a writ of possession was issued and placed in the hands of M. A. O'Brien, sheriff of Oklahoma county, in the Territory of Oklahoma, for service and return; that said sheriff holds both of said writs and unless restrained by an order of this honorable court, will execute the said writ and deprive the plaintiff of the possession of the said described property, to which in law, in equity
61 and good conscience he is entitled, and that the execution of said writs of possession would deprive the plaintiff of his earnings and his labor expended for a number of years last past, in the building of improvements upon said described property, with the full belief that the courts of the country would protect him in the enjoyment thereof; that the execution of these writs would be harsh, unjust, inequitable and wrong, and would only enable the said

Murphy and White, and their grantees to reap the unholy fruits of the corrupt, illegal and nefarious bargain which initiated their proceedings to secure this land, and whose course all through these transactions is one long trail of corruption, fraud and crime.

Plaintiff further represents that, in all the proceedings in the Land Department and in the proceedings brought by the said Murphy and the said White, the rights of this plaintiff to the land in question have never been adjudicated nor has his case ever been heard by any tribunal competent to pass upon the same.

Plaintiff alleges: that he has at all times been willing, and herewith tenders to the said defendant, Samuel Murphy, all of the legal fees that he has paid to the Government, in and about the procuring of the said patent, and herewith makes a continuing tender of the same, and is willing and ready to pay the same into the registry of the court, whenever the court shall so order.

Plaintiff alleges the value of the property in question to be more than twenty thousand dollars ($20,000).

Plaintiff further represents to the court that he has never in his life availed himself of the benefit of the homestead provisions of the laws of the United States, except as detailed in this petition; that on the 2nd day of May, A. D. 1889, when he came into the Territory as before stated, he was not the owner of one hundred and sixty (160) acres of land in any State or Territory, nor has he at any stage of the proceedings as herein narrated, been the owner of one hundred and sixty acres of land in any State or Territory; that on
62 the 2nd day of May, A. D. 1889, the plaintiff was thoroughly qualified in every respect to enter said described land as a homestead, and that at that time and at all times during the progress of the proceedings herein enumerated, the plaintiff was so qualified as an entryman, and that there existed at no time any fact or reason that could be urged as an objection to his qualification as a homestead entryman under the laws of the United States relating to the disposition of the public lands.

The premises considered, the plaintiff prays that this honorable court will grant a temporary restraining order, restraining the said M. A. O'Brien, sheriff of Oklahoma county, Oklahoma Territory, who is made party defendant to this suit, and his deputies, from executing or attempting in any manner to execute the said writs of possession so issued as aforesaid and now in his hands for execution pending the final determination of the issues involved in this suit; that upon the final hearing thereof, the said restraining order may be made perpetual; that the patent issued by the United States Government to the defendant Samuel Murphy may be declared null and void, and that the same may be cancelled; and that the said Murphy and his grantees take no title whatsoever thereunder to the said land or any portion thereof; that the said Samuel Murphy may be declared to have taken the legal title to said land simply as a trust for this plaintiff, and that each of his said grantees may be declared to have taken title to the respective portions of land

conveyed to them subject to the equities of this plaintiff and charged with the trust referred to; and that by the judgment of this court, each and every one of the defendants, who now hold title under said patent, may be required by good and sufficient deed of conveyance to convey the same to the plaintiff, William T. McMichael, that the plaintiff upon the hearing thereof may have such further relief to which, under the equities herein enumerated and under the law he may be entitled; that process may issue for each of the defendants as required by law; and that all of the said defend-
63 ants are residents of Oklahoma county, Oklahoma Territory, except Ewers White, who is a resident of Pottawatomie county, Oklahoma Territory, and the defendants Ferdinand Batchelder and Myrta S. Mitcher, whose present residence is to the plaintiff unknown.

W. T. McMICHAEL, *Plaintiff.*
CLARK & CURRY,
MILTON BRYAN,
Plaintiff's Attorneys.

64 TERRITORY OF OKLAHOMA, } *ss:*
County of Oklahoma, }

Personally appeared before the undersigned authority, William T. McMichael, who being duly sworn, says: That he is the plaintiff in the above stated cause; that he has heard the foregoing petition read, and is acquainted with the contents thereof, and that the matters and things stated therein are true.

W. T. McMICHAEL.

Sworn to and subscribed before me this 12th day of September, A. D. 1901.

[SEAL.] M. McKINLEY,
Deputy Clerk.

65 And now comes the plaintiff, William T. McMichael, and in obedience to the order of the court entered herein on motion of the defendants, on the 20th day of September, A. D. 1901, and attaches to the petition the following papers, viz: Copy of the petition in the suit of Ewers White *vs.* William T. McMichael, marked "Exhibit A"; copy of answer in the suit of Ewers White *vs.* William T. McMichael marked "Exhibit B"; copy of verdict in the suit of Ewers White *vs.* William T. McMichael, marked, "Exhibit C"; copy of judgment in the suit of Ewers White *vs.* William T. McMichael, marked, "Exhibit D"; copy of petition in the suit of Samuel Murphy *vs.* William T. McMichael, marked "Exhibit E"; copy of verdict in the suit of Samuel Murphy *vs.* William T. McMichael, marked "Exhibit F"; copy of judgment in the suit of Samuel Murphy *vs.* William T. McMichael, marked "Exhibit G".

These being copies of the judgments at law referred to, and sought to be restrained in plaintiff's petition herein.

This the 25th day of September, A. D. 1901.

CLARK & CURRY,
MILTON BRYAN,
Plaintiff's Attorneys.

66 "EXHIBIT A."

In the District Court of the Third Judicial District within and for Oklahoma County, Oklahoma Territory.

EWERS WHITE, Plaintiff,
vs.
WILLIAM T. McMICHAEL and —— McMICHAEL, His Wife, Whose Full Name is Unknown, Defendants. } Petition.

The plaintiff complains of the defendants, and for cause of action herein alleges and says that he is the owner in fee simple of the following described tract and parcel of land, situate and lying in Oklahoma county, Oklahoma Territory, to-wit: The W. ½ of the S. W. ¼ and the N. E. ¼ of the S. W. ¼ of sec. 27, in twp. 12 N. of R. 3 W., I. M., and is entitled to the immediate possession of the same; and the defendant-, William T. McMichael and his wife, —— McMichael, whose more full name is unknown to plaintiff, are trespassers upon said tract and parcel of land and occupy, use, cultivate and pasture all of said tract of land without any right whatever, to so use, possess and occupy the same and to the detriment of the plaintiff and against his express wishes, and unlawfully keep plaintiff from the possession thereof. Plaintiff says that said defendant, William T. McMichael, is a lawless and irresponsible person, and that both of said defendants are insolvent and unable to respond in damages for the use and occupation of the land, and for the trespasses committed thereon by them, and that their use and possession of said land is in the nature of a continuing trespass.

That plaintiff has exhausted his remedy at law to gain possession of the same, in the following manner, to-wit, the plaintiff commenced an action for forcible and unlawful detainer in the
67 justice's court of one G. W. Stephenson, he being a justice of the peace within and for the county and Territory of Oklahoma, and having full jurisdiction to hear and determine said case; and plaintiff prosecuted said action to a final determination in plaintiff's favor, and obtained a writ of restitution, and had the same executed and said defendant, William T. McMichael put out of possession of said tract, but that in defiance of said judgment and execution, said William T. McMichael immediately returned to said tract of land after he had been put out of possession of same by an officer, under said writ of restitution, and has continued to pasture, cultivate,

use and occupy said tract of land ever since, to the exclusion of this plaintiff; that thereupon, the plaintiff caused said defendant, William T. McMichael, to be arrested for contempt and brought before the court issuing said writ, and upon a change of venue to the probate court of Oklahoma it was held by the probate judge of said court, in substance, that no power existed in a justice of the peace to punish said William T. McMichael for a contempt, not committed in his immediate presence.

By reason of the facts above set out, plaintiff says that he is without an adequate remedy at law; that the granting of an injunction will avoid a multiplicity of petty civil and criminal lawsuits; that he is entitled to and asks for an injunction perpetually restraining and enjoining the defendant, William T. McMichael, his wife, —— McMichael, his servants, lessees, employés under his authority, from going upon, trespassing upon, pasturing, cultivating, using or occupying any portion or all of said W. ½ and N. E. ¼ of said S. W. ¼, sec. 27, twp. 12, N. of R. 3 W., I. M. in Oklahoma county, Oklahoma Territory; that plaintiff have judgment for costs of said suit, and such other and further relief as to equity pertaineth and the nature of the case requires.

J. H. EVEREST,
Att'y for Plaintiff.

68 "EXHIBIT B."

TERRITORY OF OKLAHOMA } ss:
County of Oklahoma, }

In the District Court in and for said County and Territory.

EWERS WHITE, Plaintiff,
vs.
WM. T. McMICHAEL and Wife, —— McMICHAEL, Defendants. } Answer.

Now come the defendants, William T. McMichael and wife —— McMichael, and by leave of the court had and obtained, withdrew their answer filed herein on November 16th, 1898, and file as their answer herein a general denial, which is in words and figures as follows:

Now come the defendants, W. T. McMichael and wife, —— McMichael, and in answer to the petition of the plaintiff herein, say that they deny generally and specifically each and every and all the allegations in said petition contained.

J. S. JENKINS &
J. L. BROWN,
Att'ys for Defendants.

Endorsed: 2198—Ewers White, plaintiff *vs.* Wm. T. McMichael, wife —— McMichael, defendants.—Answer—Filed in district court Oklahoma county, O. T. Nov. 2, 1899, B. D. Shear, clerk, by M. McKinley, deputy.

69 "EXHIBIT C."

In the District Court of the Third Judicial District of the Territory of Oklahoma in and for Oklahoma County.

EWERS WHITE, Plaintiff,
vs.
WILLIAM T. McMICHAEL ET AL., Defendants. } Verdict.

We, the jury empanelled and sworn in the above entitled case, do, on our oaths find the issues herein in favor of the plaintiff and against the defendant and find that the plaintiff is entitled to recover of and from the defendants the possession of the real estate involved in this action.

W. E. TOWNSEND, *Foreman*

Endorsed: 2198—Ewers White, plaintiff, *vs.* W. T. McMichael, *et al.*, defendants—Verdict—Filed this 28 day of March, 1900. B. D. Shear, clerk, by L. M. Keys, deputy.

70 "EXHIBIT D."

In the District Court of the Third Judicial District within and for the County of Oklahoma, Oklahoma Territory.

EWERS WHITE, Plaintiff,
vs.
WILLIAM T. McMICHAEL and —— McMICHAEL, His Wife, Whose Full Name is Unknown, Defendants. } Journal Entry.

Be it remembered that on this 28th day of March, A. D. 1900, the same being one of the regular court days of the February, 1900, term, of said court, the above entitled case came on for hearing in its regular order in open court, and both parties announced themselves ready for trial, and the following good and lawful jurymen were duly impaneled, charged and sworn according to law, to-wit, T. B. Davis, C. W. Armstrong, H. Stenson, C. G. King, Fred Swartz, W. E. Townsend, W. D. Olney, F. P. Leonard, E. G. Olmstead, Thomas Turner, and John Dodson, E. G. Shultz.

Thereupon the plaintiff submitted his testimony to the court and jury and rested; and the defendants submitted their testimony to

the court and jury and rested; and thereupon the plaintiff moved the court for an instruction, directing the jury to return a verdict for the plaintiff upon the evidence thus submitted, and the court, thereupon sustained the said motion and directed the said jury to return a verdict for the plaintiff, and thereupon the jury returned their said verdict which was in the following form and words, towit:

"In the District Court of the Third Judicial District of the Territory of Oklahoma in and for Oklahoma County.

EWERS WHITE, Plaintiff,
vs.
W. T. MCMICHAEL ET AL., Defendants. } Verdict.

71 We, the jury empaneled and sworn in the above entitled case, do, on our oaths, find the issues herein in favor of the plaintiff and against the defendants, and find that the plaintiff is entitled to recover of and from the defendants the possession of the real estate involved in this action.

W. E. TOWNSEND, *Foreman.*

On the 29th day of March A. D. 1900, the defendants filed their motion for a new trial in said case, and the court on the 6th day of April, A. D. 1900, in open court, having examined said motion and heard arguments of counsel for both plaintiff and defendants overruled and denied the same.

It is therefore considered, ordered and adjudged by the court, that the plaintiff has established all of the material allegations of his petition herein, and that said plaintiff is the owner in fee simple of the following tract and parcel of land described in said petition, to-wit: the west ½ of the S. W. ¼, and the N. E. ¼ of the S. W. ¼ of section 27, twp. 12, N. R. 3. W. I. M., in Oklahoma county, Territory of Oklahoma, and that said defendants unlawfully detain the possession thereof from said plaintiff, and that the said plaintiff have and recover from the defendants possession of the tract of land last above described, and that the costs of this action taxed at — dollars, be assessed against the defendants.

To each and every part of the said judgment, defendants at the time excepted and still except, and ask the court to give them time to make and serve a case-made, and that he fix the amount of the appeal bond in said case, and thereupon, the court gives said defendants 30 days to make and serve case-made with 10 days to the plaintiff to suggest amendments, said case to be presented for settlement on five days' notice, and the court further directs that the appeal bond be fixed in the amount and sum of one thousand — ($1,000.00), that execution be stayed 10 days to enable defendants to make said bond.

B. F. BURWELL,
Judge Third Judicial District.

72 Endorsed: 2198—In district court 3rd judicial district within and for Oklahoma county, Territory of Oklahoma.—Ewers White, pl'ff *vs.* Wm. T. McMichael, *et al.*, def'ts.—Journal entry—Filed Apr. 12, 1900.—B. D. Shear, clerk.

"EXHIBIT E."

In the District Court of the Third Judicial District within and for Oklahoma County, Oklahoma Territory.

SAMUEL MURPHY, Plaintiff,
vs.
WILLIAM T. MCMICHAEL, Defendant, } Ejectment.

Petition.

The plaintiff for a cause of action herein against the said defendant alleges and says:

First. That the plaintiff is owner in fee simple and has a legal and equitable estate in and is entitled to the possession of the following described real estate, situated and lying in Oklahoma county, Oklahoma Territory to-wit: The southeast quarter (S. E. ¼) of the southwest quarter (S. W. ¼) of section twenty-seven (27) in township twelve (12) north of range three (3) west, I. M. that the defendant unlawfully keeps him out of possession of the same.

Second. That the defendant, William T. McMichael, is de-
73 stroying the timber on said land and is committing waste thereon; that unless the said William T. McMichael is restrained and enjoined by the court pending the final determination of this suit for possession, that the said defendant will continue to destroy said timber and that the destruction of said timber on said real estate will cause an irreparable injury to plaintiff in this; that the said land is adjacent to Oklahoma City and is valuable for suburban property, and the destruction of the timber growing thereon, will greatly lessen the value of the freehold generally, there being but little timber on said land; that the defendant, William T. McMichael, is an wholly irresponsible person and cannot respond in damages for the waste and loss he is now committing on said freehold, which he threatens to continue to commit; that the plaintiff has no adequate remedy at law which will prevent the commission of such waste and that the granting of an injunction, enjoining and restraining the defendant from committing waste on said premises, pending the final determination of this suit, will avoid a multiplicity of petty law suits.

Wherefore, plaintiff prays for judgment for the restitution of said premises, for a temporary restraining order enjoining and restraining the defendant, his family, servants, employés and all persons acting by, through or under his authority from cutting down or

digging up any of the timber, fruit trees, shrubs or vines on said place, and from in any way committing waste on said land until the final determination of this action, and plaintiff prays also, for costs of suit.

J. H. EVEREST,
Attorney for Plaintiff.

74 TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

Sam Murphy, being duly sworn, deposes and says that he is the plaintiff in the within entitled action, that he has read the foregoing petition, and understands the contents thereof and that the things and matters therein stated are true and correct.

SAMUEL MURPHY.

Subscribed and sworn before me this 27th day of January, 1898.

[SEAL.] JNO. H. WRIGHT,
Notary Public.

My commission expires Nov. 14, 1898.

Endorsed: No. 2043—In district court Oklahoma county—Oklahoma Territory—Samuel Murphy, pl'ff, *vs.* Wm. T. McMichael, def't.—Petition—Filed in district court Oklahoma county, O. T. Jan. 27, 1898—Ed L. Dunn, per F. H. Shelly, deputy.

75 "EXHIBIT F."

In the District Court of the Third Judicial District of the Territory of Oklahoma in and for Oklahoma County.

SAMUEL MURPHY, Plaintiff,
vs.
WM. T. MCMICHAEL, Defendant. } Verdict.

We, the jury empaneled and sworn in the above entitled case, do, on our oaths find the issues herein for the plaintiff and find that the plaintiff is entitled to recover of and from the defendant the possession of the S. E. ¼ of the S. W. ¼ of section 27, twp. 12, N. R. 3 W. I. M. in Oklahoma county, Territory of Oklahoma.

EDGAR C. OLMSTEAD, *Foreman.*

Endorsed: 2043—Samuel Murphy, plaintiff, *vs.* W. T. McMichael, defendant,—Verdict—Filed this 28 day of March, 1900, B. D. Shear, clerk by L. M. Keys, deputy.

76 "EXHIBIT G."

In the District Court of the Third Judicial District within and for Oklahoma County, Oklahoma Territory.

SAMUEL MURPHY, Plaintiff,
vs.
WILLIAM T. MCMICHAEL, Defendant. } Case 2043.

Journal entry.

Now on this 11th day of April, 1901, said day being one of the regular court days of the February A. D 1901, term of said court, the above entitled cause came on to be heard in its regular order, and the plaintiff, Samuel Murphy, appeared by his attorney, J. H. Everest, and the defendant, William T. McMichael, appeared in person and by attorney, John Burton, and thereupon, the plaintiff, Samuel Murphy, and the defendants, Ewers White, Anton H. Classen and G. W. Copeland presented their demurrers to the answer and cross petition of the defendant William T. McMichael, and the court having examined the answer and cross petition filed by the defendant William T. McMichael, and having examined the demurrers filed in said case by the plaintiff, Samuel Murphy and the co-defendants, Ewers White, Anton H. Classen and G. W. Copeland, and having heard argument of counsel for both plaintiff and defendants, and being otherwise fully advised in the premises, finds that said demurrers are well taken and should be sustained on the grounds and for the reasons set forth in said demurrers, to which decision and judgment of the court in sustaining said demurrers, the said defendant, William T. McMichael, by his attorney, duly excepted, and elected to stand upon said answer and cross petition and refused to plead over, and gave notice of an appeal to the supreme court of the Territory of Oklahoma and asked that the court fix a time within which said defendant, William T. McMichael,
77 may make and serve a case-made in said case, and thereupon the plaintiff, Samuel Murphy, moved for a judgment upon the pleadings, and the court having examined the petition of the plaintiff and heard the argument of counsel upon said motion for judgment, and being otherwise fully advised in the premises, finds that said motion for judgment on the pleadings is well taken and should be sustained, and

It is therefore considered, ordered and adjudged by the court that the plaintiff, Samuel Murphy, has sustained all of the material allegations in his petition herein and that plaintiff is the owner in fee simple and has the legal and equitable estate in and to and is entitled to the possession of the following described real estate, situate and lying in Oklahoma county, Territory of Oklahoma, to-wit:

The S. E. ¼ of the S. W. ¼ of sec. 27 in township 12 north of range 3 west, Indian meridian, and that said defendant, William T. McMichael, unlawfully detains the possession thereof from said plaintiff, and that said plaintiff is entitled to a judgment for the possession of said premises, and that said plaintiff have and recover from the defendants the possession of the tract of land last above described, and that the costs of this action, taxed at $— be assessed against the defendant, William T. McMichael.

To each and every part of which said judgment, the defendant, William T. McMichael, duly accepted at the time and still excepts, and asks the court to give him time to make and serve a case-made and that the court fix the amount of the appeal bond in said case, and thereupon the court gave said defendant, William T. McMichael thirty days to make and serve a case made, with ten days to the plaintiff to suggest amendments, said case to be presented for settlement on five days' notice by either party, and the court further directs that the appeal bond be fixed in the amount and sum of $300.00, and that execution be stayed 45 days to enable defendants to make said bond.

B. F. BURWELL,
Judge Third Judicial District.

78 Endorsed: 2043.—In the district court Oklahoma county, O. T.—Samuel Murphy, pl'ff, *vs.* Wm. T. McMichael, def't.—Journal entry—Filed May 3, 1901 B. D. Shear, clerk.

Indorsed: No. 3015.—District court 3rd district, Oklahoma Territory in and for Oklahoma county. Wm. T. McMichael *vs.* Samuel Murphy, *et al* Action to declare trust, cancel patent to land—Have injunction and other relief.—Filed in district court Oklahoma county, O. T. September 12, 1901. B. D. Shear, clerk. By C. A. Stauber, deputy. Clark & Curry, Milton Bryan, pl'ffs' att'ys.

79 In the District Court, Third District of Oklahoma Territory, in and for Oklahoma County.

WILLIAM T. McMICHAEL, Plaintiff, *vs.* SAMUEL MURPHY and LOUISA MURPHY; His Wife; FERDINAND Batchelder, Ewers White, Anton H. Classen, Stella Mitchell Beebe, Myrta S. Mitcher, William L. Overholser, The Armstrong Mercantile Company, Leonidas L. Land, Oscar G. Lee, and M. A. O'Brien, Defendants.	Motion.

Now on this 12th day of September, A. D. 1901, comes the plaintiff, William T. McMichael, by his attorneys at law, Clark & Curry, and Milton Bryan, and moves the court to grant a temporary re-

straining order in the above stated cause, in accordance with the prayer of the petition filed in said suit.

CLARK & CURRY,
MILTON BRYAN,
Plaintiff's Attorneys.

The defendants will take notice that the above motion is hereby set for hearing before Hon. B. F. Burwell, judge of said court, at the court room in Oklahoma City, on Tuesday morning, September 17th, 1901, at 9 o'clock a. m.

CLARK & CURRY,
MILTON BRYAN,
Pl'ff's Att'ys.

Indorsed: # 3015—In district court 3rd district, Oklahoma Territory in and for Oklahoma county. Wm. T. McMichael *vs.* Samuel Murphy *et al.*—Action to declare trust, cancel patent to land, for injunction and other relief—Motion for restraining order and notice of hearing thereon—Filed in district court, Oklahoma county, O. T., Sept. 12, 190–. B. D. Shear, clerk, by C. A. Stauber, deputy. Clark & Curry, Milton Bryan, pl'ff's att'ys.

80 In the District Court of the Third Judicial District in and for Oklahoma County, Oklahoma Territory.

WILLIAM T. MCMICHAEL, Plaintiff,
vs.
SAMUEL MURPHY ET AL., Defendants. } Case No. 3015.

Motion.

Come now all the defendants herein, except Ferdinand Batchelder, and hereby move the court to require the plaintiff, William T. McMichael to attach to the petition herein, the petition and judgment in the case or cases instituted by Samuel Murphy against the said defendants, in which said plaintiff alleges that said Samuel Murphy secured a judgment for possession and a writ of possession, and to also attach to said petition the copy of the petition and judgment in the case or cases brought by Ewers White in this court for the possession of said tract of land, referred to in said petition.

J. H. EVEREST,
Attorney for Defendants.

Indorsed: Case # 3015—In district court 3rd judicial district within and for Oklahoma county.—Territory of Oklahoma—Wm. T. McMichael, pl'ff, *vs.* Samuel Murphy *et al.*, def 'ts.—Motion to require pl'ff to attach certain exhibits to petition. Filed Sept. 14, 1901, B. D. Shear, clerk, by M. McKinley, deputy.—J. H. Everest, for def 'ts.

81 In the District Court of the Third Judicial District within and for Oklahoma County, Oklahoma Territory.

WILLIAM T. McMICHAEL, Plaintiff,
vs.
SAMUEL MURPHY ET AL., Defendants. } Case No. 3015. Demurrer.

Come now the above named defendants and for joint demurrer to the petition of the plaintiff allege and say,

First. That said petition shows upon its face that said action is fully barred and that said cause is *res adjudicata* as against these defendants by reason of the prior judgments in the case of Samuel Murphy *vs.* William T. McMichael, *et al.*, and of Ewers White *vs.* William T. McMichael, *et al.*

Second. That said petition wholly fails to state facts sufficient to constitute any cause of action against these defendants or any of them.

J. H. EVEREST,
Attorney for Defendants.

Indorsed: Case 3015—In district court of third jud. district in Oklahoma Co., O. T.—Wm. T. McMichael, pl'ff, *vs.* Samuel Murphy, *et al.*, def't.—Demurrer—Filed Oct. 11, 1901. B. D. Shear, clerk, by M. McKinley, deputy.

82 In the District Court of the Third Judicial District of Oklahoma Territory in and for Oklahoma County.

WILLIAM T. McMICHAEL, Plaintiff,
vs.
SAMUEL MURPHY ET AL., Defendants. } Case No. 3015. Motion to Strike Demurrer.

And now on this 21st day of October A. D. 1901, comes the plaintiff and moves the court to strike from the files of said cause and from the demurrer of the defendant's to plaintiff's petition filed herein October 11th, 1901, the first ground of said demurrer for reasons following, to-wit:

1st., The matters set up in said first ground are not recognized as proper grounds of demurrer under the Territorial Code of Civil Procedure.

2nd. *Res judicata* cannot be raised by demurrer, but can only be raised by plea or answer.

CLARK & CURRY,
MILTON BRYAN,
Plaintiff's Attorneys.

Indorsed: Case No. 3015—In district court 3rd district Oklahoma Territory—Oklahoma county—Wm. T. McMichael *vs.* Sam'l

Murphy, *et al.*—Motion to strike—Ground of demurrer—Filed Oct. 21, 1901—B. D. Shear, clerk—by M. McKinley, deputy—Clark & Curry, Milton Bryan, pl'ff's att'ys.

83 In the District Court of the Third Judicial District within and for Oklahoma County, Territory of Oklahoma.

WILLIAM T. McMICHAEL, Plaintiff,
vs.
SAMUEL MURPHY ET AL., Defendants. } Case No. 3015. Journal Entry.

Now on the 25th day of October A. D. 1901, the same being one of the regular court days of the September A. D. 1901, term of said court held at Oklahoma City, in the county and Territory aforesaid, the above entitled cause came on to be heard in its regular order pursuant to assignment, and the plaintiff appeared by his attorneys, Messrs. Clark and Bryan, and the defendants appeared by their attorney, J. H. Everest, and thereupon the plaintiff submitted to the court a motion to strike out the first ground of the defendant's demurrer, and after considering said motion and hearing argument for both the plaintiff and defendant the court sustained said motion, and ordered the first paragraph of said demurrer stricken out, to which judgment and action of the court the defendants excepted, and thereupon the defendants presented the demurrer to the petition of the plaintiff, to the court, and the court having examined the petition in said case and having heard the argument of counsel for both plaintiff and defendants, and being otherwise fully advised in the premises finds that said demurrer is well taken, and should be sustained for the reason therein alleged, to-wit: that said petition wholly fails to state facts sufficient to constitute any cause of action against the defendants, of any of them, to which action of the court in sustaining said demurrer the plaintiff excepted; and thereupon the court asked the plaintiff whether he desired to amend said petition or elected to stand upon said petition; thereupon the court dismissed, the case, and rendered judgment against the said plaintiff, William T. McMichael, for the costs of this suit taxed at — dollars; to all of which order and judgment in so far as the
84 same was adverse to him plaintiff excepted at the time, and still excepts; and thereupon plaintiff gave notice of appeal to the supreme court of the Territory of Oklahoma, and was allowed 60 days in which to prepare and serve transcript or case-made, 10 days allowed for amendments, with 5 days' notice of presentation of transcript or case-made for settlement.

B. F. BURWELL,
Judge Third Judicial District.

J. H. EVEREST,
Attorney for Plaintiff.
FRANK CLARK,
MILTON BRYAN,
Attorneys for Defendants.

Indorsed: Wm. T. McMichael, *vs.* Samuel Murphy, *et al.*,—Journal entry—Filed Nov. 14, 1901—B. D. Shear, clerk, by M. M. McKinley, deputy.

85 TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

I, B. D. Shear, clerk of the district court in and for said county and Territory, do hereby certify that the foregoing is a true, full and complete copy of all the pleadings, motions, orders and judgments had in said cause as the same appears on file and of record in my office.

Witness my hand and official seal this 25th day of November, A. D. 1901.

[SEAL.]

B. D. SHEAR, *Clerk,*
By M. McKINLEY, *Deputy.*

Filed Nov. 30, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

86 Said record or transcript is endorsed as follows, to-wit: 1164—In the supreme court, Territory of Oklahoma—Wm. T. McMichael, pl'ff in error, *vs.* Sam'l Murphy, *et al.*, def'ts in error—Record—Filed Nov. 30, 1901—Benj. F. Hegler, clerk supreme court—By Jessie Pardoe, deputy.

87 And thereafter, at the January, 1902, term of said supreme court, on the fourteenth day of January, 1902, the following proceeding was had in said cause, to-wit:

WILLIAM T. McMICHAEL, Plaintiff in Error,
vs. } # 1164.
SAMUEL MURPHY ET AL., Defendants in Error.

Come now Clark & Bryan, counsel for plaintiff in error, and J. H. Everest, counsel for defendants in error, and make oral argument in this cause. And plaintiff in error is given five days to file reply briefs, and cause is taken on oral argument, record and briefs.

88 And thereafter on the 31st day of May, 1902, there was filed in said supreme court a motion to resubmit cause, which motion reads in words and figures as follows, to-wit:

In the Supreme Court of the Territory of Oklahoma, June Term A. D. 1902.

WILLIAM T. McMICHAEL, Plaintiff in Error,
vs.
SAMUEL MURPHY ET AL., Defendants in Error. } Case No. 1164.

The above stated cause having been submitted to the court on printed briefs and oral argument of the attorneys for the respective parties at the January term A. D. 1902, of this honorable court, and no decision thereof having as yet been handed down or rendered in said cause, and the personnel of the court having been changed and its membership increased by the addition of two more justices since the filing of briefs and the making of arguments as aforesaid come now the attorneys for the plaintiff in error herein and respectfully move the court that said cause may be resubmitted to the full bench of this honorable court as at present constituted upon the printed briefs of the respective parties now of file with the record of said cause in this court.

Respectfully submitted,

CLARK & BRYAN,
Attorneys for Plaintiff in Error.

89 The defendants in error and their counsel will take notice that the foregoing motion will be submitted to the supreme court at Guthrie, Oklahoma, on Monday the 2nd day of June A. D. 1902, or at such time thereafter as the said court will entertain the same. This May 29th, 1902.

CLARK & BRYAN,
Attorneys for Plaintiff in Error.

Filed: May 31, 1902—

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Said motion is endorsed on back as follows, to-wit: Case No. 1164—In the supreme court of Territory of Oklahoma — June term, 1902—Wm. T. McMichael, plaintiff in error, *vs.* Sam'l Murphy, *et al.*, defendants in error—Motion to resubmit cause—Filed May 31, 1902, Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy—Clark & Bryan, attorneys for plaintiff in error.

90 And thereafter, at the June, term, 1902, on the third day of June, 1902, the following proceeding was had in said cause, to-wit:

WILLIAM T. McMICHAEL, Plaintiff in Error,
vs.
SAMUEL MURPHY ET AL., Defendants in Error. } # 1164.

And now this cause, having been previously submitted, comes on for consideration by the court to resubmit the same.

And the court having duly considered said motion, and being fully advised in the premises, finds: That the same should be denied.

It is therefore ordered by the court: That the motion to resubmit be and the same is hereby denied.

91 And thereafter on the tenth day of July, 1902, there was filed in said supreme court, a motion to revive in the name of the heirs, which motion reads in words and figures as follows, to-wit:

In the Supreme Court of the Territory of Oklahoma, June Term, 1902.

WILLIAM T. McMICHAEL, Plaintiff in Error,
vs.
SAMUEL MURPHY ET AL., Defendants in Error. } Case No. 1164.

To the honorable the supreme court of the Territory of Oklahoma.

The petition of Laura F. McMichael, Walter S. McMichael, Lillian M. McMichael, each of whom are adults, and Lula F. McMichael, James W. McMichael, Effie L. McMichael, William F. McMichael, Maud McMichael and Bertha McMichael, all of whom are minors, and appear herein by their next friend and natural guardian, Laura F. McMichael, respectfully represents unto this honorable court as follows:

First. That this is a suit involving the title to certain real estate situate, lying and being in Oklahoma county, Oklahoma Territory.

Second. That since this cause has been pending in this honorable court, to-wit: on the 18th day of June A. D. 1902, at the city of Oklahoma City, Oklahoma county, Oklahoma Territory, the plaintiff in error in said cause, William T. McMichael, died, intestate, leaving as his only and sole heirs at law the following persons, viz: Laura F. McMichael the widow of the said William T. McMichael, and eight (8) children whose names and ages are as follows, to-wit:

92 Walter S. McMichael, aged twenty-one years; Lillian M. McMichael, aged nineteen years; Lula F. McMichael, aged seventeen years; James W. McMichael, aged fifteen years; Effie L. McMichael, aged thirteen years; William F. McMichael, aged ten years; Maud McMichael, aged seven years and Bertha McMichael, aged five years.

Third. That only two of said children are adults and competent to sue in their own names, viz: Walter S. McMichael and Lillian M. McMichael, the remaining six being minors under the law; that all of said children are the children of the said William T. McMichael, deceased, and of the said Laura F. McMichael.

The premises considered, your petitioners move the court that an order may be entered herein substituting as plaintiffs in error in said cause in lieu of the said William T. McMichael, deceased, your petitioners, viz: Laura F. McMichael, Walter S. McMichael and Lillian M. McMichael, in thir own proper persons, and Lula F. McMichael, James W. McMichael, Effie L. McMichael, William F. McMichael, Maud McMichael and Bertha McMichael by their next friend, Laura F. McMichael, as the sole heirs at law of William T. McMichael, deceased, and that said cause may be proceeded with by and in behalf of said named parties as such heirs at law.

LAURA F. McMICHAEL,
WALTER S. McMICHAEL,
LILLIAN M. McMICHAEL, AND
LULA F. McMICHAEL,
JAMES W. McMICHAEL,
EFFIE L. McMICHAEL,
WILLIAM T. McMICHAEL,
MAUD McMICHAEL,
BERTHA McMICHAEL,
By their next friend, LAURA F. McMICHAEL,
By CLARK & BRYAN, *Their Attorneys.*

93 TERRITORY OF OKLAHOMA, }
County of Oklahoma. }

Personally appeared before the undersigned authority, Laura F. McMichael, who being duly sworn says that she is the widow of William T. McMichael, lately deceased, who was the plaintiff in error in case No. 1164, now pending in the supreme court of the Territory of Oklahoma; that she has read the foregoing petition and motion and is acquainted with the contents of the same and that the matters and things therein stated are of her own knowledge true.

LAURA F. McMICHAEL.

Sworn to and subscribed before me this 9 day of July A. D. 1902.

[SEAL.] SAM HOOKER,
Notary Public.

My commission expires May 29, 1906.

Filed July 10, 1902.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Said motion is endorsed on back as follows: Case No. 1164—In the supreme court of the Territory of Oklahoma—William T. McMichael, plaintiff in error, *vs.* Samuel Murphy, *et al.*, defendants in error—Motion to revive—Filed July 10, 1902, Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.—Clark & Bryan, attorneys for plaintiff in error.

94 And thereafter, at the June, 1902, term of said supreme court, on the 18th day of July, 1902, the following proceeding was had in said cause, to-wit:

WILLIAM T. MCMICHAEL, Plaintiff in Error,
vs.
SAMUEL MURPHY, LOUISA MURPHY, His Wife, ET AL., Defendants in Error. } #1164.

Ordered by the court: That the motion for revivor herein be granted, and that this cause be revived in the name of the heirs of plaintiff in error, William T. McMichael.

95 And thereafter, at the June, 1902, term of said supreme court, on the second day of September, 1902, the following proceeding was had in said cause, towit:

LAURA F. MCMICHAEL, WALTER S. MCMICHAEL, LILLIAN M. McMichael, Adults, and Lula F. McMichael, James W. McMichael, Effie L. McMichael, William T. McMichael, Maud McMichael, and Bertha McMichael, Minors, by Their Next Friend, Laura F. McMichael, Heirs at Law of William T. McMichael, Deceased, Plaintiffs in Error,
vs.
SAMUEL MURPHY ET AL., Defendants in Error. } #1164.

And now this cause comes on for final decision by the court, upon the record, briefs and oral argument submitted therein.

And the court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiffs in error.

It is therefore ordered and adjudged by the court, that the judgment of the lower court in this cause be and the same is hereby affirmed, at the cost of plaintiffs in error.

Opinion by Hainer, J. All the justices concurring, except Burwell, J., who presided in the trial of the cause below, not sitting, and Beauchamp, J., absent.

Which said opinion reads in words and figures as follows, to-wit:

96 In the Supreme Court of the Territory of Oklahoma, June Term, 1902.

Filed Sept. 2, 1902.

LAURA F. McMICHAEL, WALTER S. McMICHAEL, Lillian M. McMichael, Adults, and Lula F. McMichael, James W. McMichael, Effie L. McMichael, William F. McMichael, Maud McMichael, and Bertha McMichael, Minors, Heirs at Law of William T. McMichael, Deceased, by Their Next Friend, Laura F. McMichael, Plaintiffs in Error,

vs.

SAMUEL MURPHY ET AL., Defendants in Error. } No. 1164.

Syllabus.

1. A homestead entry, valid upon its face, constitutes such an appropriation and withdrawal of the land as to segregate it from the public domain, and precludes it from subsequent homestead entry or settlement until the original entry is canceled or declared forfeited; in which case the land reverts to the Government as a part of the public domain, and becomes again subject to entry under the land laws of the United States.
2. One who makes settlement on a tract of land while it is covered by the homestead entry of another is a mere intruder, a naked, unlawful trespasser; and no right either in law or equity can be founded thereon.

Error from the district court of Oklahoma county.

B. F. Burwell, trial judge.

Affirmed.

Clark and Bryan, for plaintiffs in error.
J. H. Everest, for defendants in error.

Statement of the Case.

The material facts in this case are undisputed, and are substantially as follows: On April 23, 1889, Ewers White made homestead entry number six on the southwest quarter of section twenty-seven, township twelve north, range three west, at the United States land office at Guthrie, Oklahoma. On April 24, 1889, Charley J. Blanchard made homestead application for the same tract of land. On May 1, 1889, Vestal S. Cook made application for the same tract of

land. The applications of Blanchard and Cook were rejected, because of conflict with White's entry. On April 27, 1889, Blanchard filed an affidavit of contest, charging that White had entered the Territory of Oklahoma prior to twelve o'clock noon, April 22, 1889, in violation of the act of Congress approved March 2, 1889, and the President's proclamation issued pursuant thereto. On May 1, 1889, Cook also filed an affidavit of contest, attacking White's entry, alleging that he was disqualified to enter said lands, and also alleging that Blanchard was disqualified from entering said lands, for the reason that he had entered upon said lands prior to twelve o'clock noon, April 22, 1889, in violation of the Federal law. On July 16, 1889, the cause was tried before the local land office, and the register and receiver of said office recommended the cancellation of White's entry, and dismissed the contests of both Blanchard and Cook. All parties appealed from this decision to the Commissioner of the General Land Office. And on March 7, 1890, the decision of the local land office was affirmed. From this decision an appeal was taken to the Secretary of the Interior. On November 29, 1890, while the cause was pending before the Secretary of the Interior, White relinquished his homestead entry, and the defendant, Samuel Murphy, entered said tract of land. And on July 21, 1891, the Secretary of the Interior affirmed the decision of the Commissioner of the General Land Office.—Blanchard *v.* White *et al.*, 13 L. D. 66,
97 On or about June 3, 1889, while White's homestead entry was still intact, the plaintiff in error, William T. McMichael, entered upon said tract of land, with the view of establishing his residence thereon, and initiating a homestead right to said land. On July 21, 1889, he made application to the local land office to enter said tract of land, tendering the fees prescribed by law, which application was rejected by the local land office, for being in conflict with White's entry. No appeal was taken from the rejection of this application to the Commissioner of the General Land Office. On August 31, 1889, McMichael again appeared before the local land office and tendered his application, together with the fees to enter said tract of land as a homestead. This application, it appears, was received by the local land officers, and was suspended pending the final decision of the contest of White, Blanchard and Cook. On the same day, to-wit: August 31, 1889, McMichael, the plaintiff in error, filed a contest or protest, alleging that he had made settlement on the land on June 3, 1889, and had lived thereon in a tent with his family until August 2, 1889, when he was ejected therefrom by the military at the instance of White, and that his rights were superior to those of White, Blanchard and Cook, all of whom were disqualified by reason of having entered the Territory during the period prohibited by law; that he made the application to enter said tract on June 3, which was rejected because it conflicted with White's entry; that he was the only qualified settler on the tract entitled to make entry thereof, and he protested against any other person being permitted to enter said land.

On February 15, 1892, a hearing was had before the land office between the plaintiff in error, McMichael, and the defendant in error, Murphy. The local land office decided the case in favor of Murphy and against McMichael, and the latter appealed to the General Land Office. On January 18, 1893, the Commissioner of the General Land Office affirmed the decision of the local office. From that decision McMichael appealed to the Secretary of the Interior. And on February 25, 1895, the Secretary of the Interior affirmed the decision of the Commissioner of the General Land Office. The facts are clearly and fully stated by the Secretary of the Interior in McMichael *v.* Murphy *et al.*, 20 L. D. 147.

A patent having been issued by the United States to Murphy for said land, this action was brought in the district court of Oklahoma county by the plaintiff in error, William T. McMichael, against Samuel Murphy, defendant in error, and his grantees to declare a resulting trust, and that the defendants be decreed to hold the legal title to the land in trust for the use and benefit of the plaintiff in error. To the plaintiff's petition the defendants interposed a demurrer, on the ground that said petition did not state facts sufficient to constitute a cause of action:—the plaintiff's claim being that the Secretary of the Interior has misconstrued and misapplied the law. The district court sustained the demurrer to the petition. And thereupon, the plaintiff having elected to stand upon said petition, the court dismissed the plaintiff's cause of action. From which decree of dismissal the plaintiff in error brought the cause here for review. Since the cause has been filed in this court the plaintiff in error, William T. McMichael, died, and at this term of court the cause has been revived in the name of his legal heirs.

Opinion of the court by HAINER, J.:

It was contended before the land tribunal, as it is here, by the plaintiff in error, that the homestead entry of White was absolutely void, and, therefore, McMichael had a lawful right to enter upon said land and make settlement thereon, and that he acquired an inceptive right as a homestead claimant by virtue of such settlement, notwithstanding the fact that White's entry was still of record. The Secretary of the Interior held that the homestead entry of White was not void, but voidable, and while it remained of record the land was segregated from subsequent entry or settlement. And this has been the uniform ruling of the land tribunal. In McMichael *v.* Murphy *et al.*, 20 L. D. 147, the Secretary of the Interior in passing upon this question uses the following language:

"McMichael urges strenuously that White's entry was void, and asks a specific ruling upon that proposition. Although White entered the Oklahoma country during the prohibited period, yet his homestead entry was *prima facie* valid. Its invalidity had to be established by extraneous evidence, and a judgment as to its illegality pronounced by a competent tribunal. Had that never

been done, the tract covered by said entry would have remained forever segregated from the public domain; so far, at least, as the unquestioned legality of the entry itself could have accomplished that fact. Hence it cannot be regarded as void but voidable only."

98 The Supreme Court of the United States has held that a homestead entry, valid upon its face, constitutes such an appropriation and withdrawal of the land as to segregate it from the public domain, and precludes it from subsequent homestead entry or settlement, until the original entry is cancelled or declared forfeited; in which case the land reverts to the Government as a part of the public domain, and becomes again subject to entry under the land laws of the United States. And this doctrine has been announced in such a number and variety of cases by our court of last resort that it may now be regarded as one of the fundamental principles underlying the land system of this country. Chotard *v.* Pope, 12 Wheaton, 586; Wilcox *v.* Jackson, 13 Peter, 498; Carroll *v.* Safford, 3 Howard, 441; Witherspoon *v.* Duncan, 4 Wall. 210; Pacific R. R. Co. *v.* Dunmeyer, 113 U. S. 629; Hastings & Dakota R. R. Co. *v.* Whitney, 132 U. S. 357; Sturr *v.* Beck, 133 U. S., 541; Sioux City & Iowa Falls *v.* Griffey, 143 U. S., 40; Whitney *v.* Taylor, 158 U. S., 65.

As early as 1827 Mr. Justice Washington, in delivering the opinion of the court in Chotard *v.* Pope, defines the word *entry* as applied to the appropriation of public lands as follows:

"It means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known in the legislation of several States by the epithet of an entry-taker, and corresponding very much in his functions with the registers of land offices, under the acts of the United States."

In Wilcox *v.* Jackson it was held that whenever a tract of land has been legally appropriated to any purpose, from that moment it becomes severed from the mass of public lands, and that no subsequent law will be construed to embrace it or operate upon it, and that the validity and effect of the appropriation did not depend upon it being subjected afterwards to cancellation because of the omission of some particular duty of the party claiming its benefit.

In Witherspoon *v.* Duncan the court held in accordance with the decision in Carroll *v.* Safford, that lands originally public cease to be public after they have been entered at the land office, and the certificate of entry has been obtained. And the court further held that this applies as well to homestead and preëmption as to cash entries. In either case the entry being made and the certificate being executed and delivered, the particular tract entered thereby becomes segregated from the mass of public lands, and takes the character of private property. And the fact that such an entry may not be confirmed by the land office on account of any alleged defect therein, or may be canceled or declared forfeited on account

of non-compliance with the law, or even declared void after patent has issued on account of fraud in a direct proceeding for that purpose in the courts, is an incident inherent in all entries of the public lands.

In Hastings & Dakota R. Co. *v.* Whitney, it was declared that the almost uniform practice of the department has been to regard land upon which an entry of record, valid upon its face, has been made, as appropriated and withdrawn from subsequent homestead entry, pre-emption, settlement, sale or grant until the original entry be canceled, or be declared forfeited; in which case the land reverts to the Government as a part of the public domain, and becomes again subject to entry under the land laws. And it was further held that whatever defects there might be in an entry so long as it remained a subsisting entry of record, whose legality had been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from a subsequent grant by Congress. In this case it was contended, as it is here, that the homestead entry was absolutely void, and that no rights could be acquired by virtue of said entry and, therefore, an inceptive right could be acquired while the homestead entry remains uncanceled of record. The district court in the State of Minnesota held accordingly. The cause was thereupon appealed to the supreme court of that State, and the decision of the district court was reversed,—the supreme court of Minnesota holding that the entry was not void, but merely voidable, and therefore, the homestead entry while it remained of record segregated the tract from a subsequent grant or appropriation. (Hastings & Dakota R. Co. *v.* Whitney, 34 Min. 538, 27 N. W. 69.) The cause was thereupon appealed to the
99 Supreme Court of the United States, and the decision of the supreme court of Minnesota was affirmed. Mr. Justice Lamar, in discussing what constitutes an entry and appropriation of land, said:

"Under the homestead law, three things are needed to be done in order to constitute an entry on public lands; first, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered. If either one of these integral parts of an entry is defective, that is, if the affidavit be insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash, the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterwards canceled on account of these defects by the Commissioner, or on appeal by the Secretary of the Interior; or, as is often the practice, the

entry may be suspended, a hearing ordered, and the party notified to show by supplemental proof a full compliance with the requirements of the department; and on failure to do so the entry may then be canceled. But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity."

In Sturr *v.* Beck and Sioux City & Iowa Falls Lot and Land Co. *v.* Griffey, the same doctrine was reaffirmed and applied.

In Whitney *v.* Taylor it was declared that an existing claim on the records of the local land office by an individual under the homestead law which has been recognized by the Government officers and not canceled or set aside excepts the tract from a subsequent grant, although such claim may not be enforceable by the claimant, and is subject to cancellation by the Government.

Counsel for plaintiff in error cite the case of Calhoun *v.* Violet, 173 U. S. 60, in support of their contention. In this case the court held that since Calhoun had entered the territory during the prohibited period, that his homestead entry was void; and the ruling of the Land Department was upheld. In this case the question of what constitutes a void or voidable entry did not arise, and we do not think that the Supreme Court of the United States intended in any wise to modify the well settled doctrine of that court that a homestead entry, valid upon its face, constitutes such an appropriation and withdrawal of the land as to segregate it from the public domain, and precludes it from subsequent homestead entry or settlement until the original entry is cancelled or declared forfeited.

The distinction between a void and a voidable act is clearly and tersely stated by Mr. Chief Justice Fuller in Weeks *v.* Bridgman, 159 U. S. 540, as follows:

"It is rarely that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act; while things are often said to be void which are without validity until confirmed."

Applying these decisions, which this court must regard as final and authorit-ive, to the case at bar it follows that White's homestead entry was *prima facie* valid; that its invalidity had to be determined by a competent tribunal—and that tribunal was the Land Department of the United States,—and so long as White's entry remained uncanceled of record it segregated the tract of land from the mass of the public domain and precluded McMichael from acquiring an inceptive right thereto by virtue of his alleged settlement. McMichael having entered upon the land more than thirty days after White had made his homestead entry, he could not be regarded as a prior settler thereon. He was a mere intruder, a naked, unlawful trespasser; and no right, either in law or equity can be founded thereon. Being a mere trespasser, White had the undoubted right to eject him from said land. McMichael being a mere intruder and a trespasser, he is precluded from saying that he was deprived of any right by reason of his ejectment by the military at the

instance of White. And in this connection this court will take judicial knowledge of the fact that Oklahoma was opened to settlement on April 22, 1889; that the organic act of Oklahoma
100 went into effect on May 2, 1890; that the Congress of the United States by virtue of said organic act put in force the laws of the State of Nebraska until after the adjournment of the first session of the Legislative Assembly of said Territory; and that from April 22, 1889, until the organic act of Oklahoma went into effect there was no law in Oklahoma Territory to redress any wrongs affecting persons or property. This court will presume that Captain D. F. Stiles, who was in command of the military forces in Oklahoma City at that time, acted rightfully, and for the purpose of preserving the public peace. It appears that there were five contestants besides McMichael for this particular tract of land. There was Blanchard, Cook, Fuller, Renfro, Holt and McMichael. If McMichael had a right to enter upon the tract of land more than thirty days after the land was segregated from the public domain by White's entry, then the other contestants had equally the same right to enter upon the land. The inevitable result of so many clashing interests and conflicting claims would result in violence and even bloodshed.

Manifestly it is against the policy of the law to permit any one to acquire an inceptive right by any alleged settlement after the land has once been segregated from the public domain, and while the original entry remains of record. It indeed would have shocked the moral sense of the framers of the beneficent homestead laws, if the land tribunal or the courts would hold that a person could acquire an inchoate right to any portion of the public domain by trespass, by force, by violence, and by acts and conduct which are calculated to lead to homicide and other crimes of less moral turpitude. It follows that McMichael acquired no right whatever by his unwarranted intrusion or trespass upon the possessory rights of White; and that his status in this case is that of a mere unsuccessful contestant seeking to obtain a preference right by virtue of his contest or protest. And being a mere unsuccessful contestant he has no vested interest in said land and, therefore, neither he nor his heirs can maintain this action. Parker *v.* Lynch, 7 Okla. 631; and cases there cited.

We therefore hold that the petition did not state facts sufficient to constitute a cause of action, and the demurrer was properly sustained. The judgment of the district court of Oklahoma county was right, and it is, therefore, affirmed.

All the justices concurring except Burwell, J., who having presided in the court below, not sitting, and Beauchamp J., not present.

101 No. 1164.

In the Supreme Court of the Territory of Oklahoma.

WM. T. MCMICHAEL, Plaintiff in Error,
vs.
SAMUEL MURPHY ET AL., Defendants in Error. } Case No. 1164.

Motion to Revive.

To the Honorable Bayard T. Hainer, associate justice of the supreme court, Territory of Oklahoma, in vacation:

The petition of Walter S. McMichael, Lillian M. Harris and Lula F. McGee, each of whom are adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael and Bertha McMichael, all of whom are minors and appear herein by their next friend, Henry W. Throckmorton, and respectfully represent unto this honorable court as follows:

First. That this is a suit involving the title to certain real estate situate, lying and being in Oklahoma county, Oklahoma Territory.

Second. That since this cause has been pending in this honorable court, to-wit: on the 18th day of June A. D. 1902, at the city of Oklahoma City, Oklahoma county, Oklahoma Territory, the plaintiff in error in said cause, William T. McMichael, died intestate, leaving as his only and sole heirs at law the following persons, viz: Laura F. McMichael, the widow of the said William T. McMichael, and eight children, whose names and ages were at that time as follows, to-wit; Walter S. McMichael, aged twenty-one years; Lillian M. McMichael, aged nineteen years; Lula F. McMichael, aged seventeen years; James W. McMichael, aged fifteen years; Effie L. McMichael, aged thirteen years; William F. McMichael, aged ten years; Maude McMichael, aged seven years; and Bertha McMichael, aged five years; and

102 Third. That on or about July 10th, 1902, the said action was revived in the name of Laura F. McMichael, widow of the said William T. McMichael, deceased, and the said Walter S. McMichael and Lillian M. McMichael, adults, and Lula F. McMichael, James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael and Bertha McMichael by their next friend Laura F. McMichael, as the sole heirs at law of the said William T McMichael, deceased, and

Fourth. Thereafter during the month of January, 1903, the said Laura F. McMichael died intestate, leaving as her heirs at law, and the heirs at law of the said William T. McMichael, deceased, the said eight children, of whom the said Walter S. McMichael was aged twenty-two years; Lillian M. McMichael aged twenty years and now inter-married with Willis Harris; and Lula F. McMichael aged

eighteen, now inter-married with A. W. McGee; who were adults and competent to sue in their own names, and that the remaining five children, to-wit: James W. McMichael then aged sixteen years; Effie L. McMichael then aged thirteen years; William F. McMichael then aged eleven years; Maude McMichael, then aged eight years; and Bertha McMichael then aged five years were minors, and that said children are the children of the said William T. McMichael, deceased, and of Laura F. McMichael, deceased.

And the premises being considered, your petitioners move the court that an order may be entered herein substituting as plaintiffs in error in said cause in lieu of the said William T. McMichael, deceased, and Laura F. McMichael, deceased, your petitioners Walter S. McMichael, Lillian M. Harris and Lula F. McGee, adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael and Bertha McMichael, by their next friend Henry W. Throckmorton, as the sole heirs at law of William
103 T. McMichael, deceased, and of Laura F. McMichael, deceased, and that the said cause may be proceeded with by and in behalf of the said named parties, as such heirs at law.

(Signed) WALTER S. McMICHAEL,
LILLIAN M. HARRIS,
LULA F. McGEE AND
JAMES W. McMICHAEL,
EFFIE L. McMICHAEL,
WILLIAM F. McMICHAEL,
MAUDE McMICHAEL AND
BERTHA McMICHAEL, *Minors*,
By their next friend, HENRY W. THROCKMORTON,
By CLARK AND BRYAN AND
McATEE & HUNTER,
Their Attorneys.

JULY 7TH, 1903.

Service of above motion accepted and acknowledged this date, and notice of the presentation of said motion and application waived.

(Signed) J. H. EVEREST,
Att'y for Defendant.

Endorsed as follows: No. 1164. In the supreme court of the Territory of Oklahoma.—William T. McMichael, plaintiff in error *vs.* Samuel Murphy *et al.*, defendants in error. Motion to revive. Filed July 14, 1903, Benj. F. Hegler, clerk supreme court.

104 In the Supreme Court of the Territory of Oklahoma.

WILLIAM T. McMICHAEL, Plaintiff in Error, *vs.* SAMUEL MURPHY ET AL., Defendants in Error.	1164. Order of Court to Revive Cause.

This cause coming on to be heard upon this the 8th day of July, 1903, in vacation, upon the petition of Walter S. McMichael, Lillian M. Harris and Lula F. McGee, each of whom are adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael and Bertha McMichael, all of whom are minors and appear herein by their next friend, Henry W. Throckmorton, and all of which said adults and minors appear as the heirs at law of William T. McMichael, deceased, and of Laura F. McMichael, deceased, and it is found by the court that the plaintiff in error, William T. McMichael died intestate on the 18th day of June, 1902, and that Laura F. McMichael, his widow, died intestate during the month of January, 1903, leaving the said adult children, and the said minor children to be their sole heirs at law, and that Henry W. Throckmorton is a suitable person for appointment as the next friend of the said minors.

And that the said Walter S. McMichael is now aged twenty-two years; the said Lillian McMichael is now aged twenty years, and inter-married with Willis Harris; and Lula F. McMichael now aged eighteen and now inter-married with A. W. McGee; all of whom are adults and competent to sue in their own names, and that the remaining five children, to-wit: James W. McMichael, now aged sixteen years; Effie L. McMichael, now aged thirteen years; William F. McMichael, now aged eleven years; Maude McMichael,
105 now aged eight and Bertha McMichael, now aged five years; who are each of them minors, and that the said children are the children and sole heirs at law of the said William T. McMichael, deceased, and of Laura F. McMichael, deceased; and that Henry W. Throckmorton is the next friend of the said minor children.

It is now hereby ordered that the said Walter S. McMichael, Lillian M. Harris and Lula F. McGee, adults, and James W. McMichael, Effie L. McMichael, William F. McMichael, Maude McMichael, and Bertha McMichael, minors, by their next friend, Henry W. Throckmorton, be substituted as plaintiffs in error in said cause in lieu of the said William T. McMichael, deceased, and Laura F. McMichael, deceased, and that the cause shall be proceeded with by and on behalf of the said named parties as such heirs at law.

(Signed) BAYARD T. HAINER,
Associate Justice.

Endorsed as follows: No. 1164. In the supreme court of Oklahoma. William T. McMichael, plaintiff in error, *vs.* Samuel Murphy *et al.*, defendants in error. Order to revive cause. Filed July 14, 1903, Benj. F. Hegler, clerk supreme court.

106 In the Supreme Court of the Territory of Oklahoma.

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the foregoing 105 pages, numbered from 1 to 105 inclusive, are a full, true and complete transcript of the record and all proceedings in said supreme court in the case of Walter S. McMichael *et al.*, plaintiffs in error, *vs.* Samuel Murphy, *et al.*, defendants in error, as the same remain upon the files and records of said supreme court.

In testimony whereof I hereunto subscribe my name and affix the seal of said supreme court, at the city of Guthrie, this 29th day of December, 1903.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Endorsed on cover: File No. 19,183. Territory of Oklahoma supreme court. Term No. 166. Walter S. McMichael, Lillian M. Harris, Lula F. McGee, *et al.*, plaintiffs in error and appellants, *vs.* Samuel Murphy, Louisa Murphy, his wife, Ferdinand Batchelder *et al.* Filed January 2, 1904. File No. 19,183.

Office Supreme Court U. S.
FILED
JAN 26 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

October Term, 1904.

WALTER S. McMICHAEL, et al.,
Plaintiffs in Error and Appellants,

vs.

SAMUEL MURPHY, et al.

No. 166.

In Error to and Appeal from the Supreme Court of the Territory of Oklahoma.

Brief for Plaintiffs in Error and Appellants.

JOS. K. McCAMMON,
JAMES H. HAYDEN,
FRANK CLARK,
Of Counsel for Plaintiffs in Error and Appellants.

PRESS OF BYRON S. ADAMS.

Supreme Court of the United States.

October Term, 1904.

WALTER S. McMICHAEL, et al.,
Plaintiffs in Error and Appellants,

vs.

SAMUEL MURPHY, et al.

No. 166.

Brief for Plaintiffs in Error and Appellants.

STATEMENT OF THE CASE.

This is a writ of error to and appeal from the Supreme Court of the Territory of Oklahoma to review the judgment (pp. 61, 62-68) whereby it affirmed the judgment of the District Court of Oklahoma county (p. 56), sustaining the demurrer to the petition of William T. McMichael, and dismissed his suit.

On September 12, 1901, McMichael filed his petition in the district court, praying that the defendant Murphy be declared to have taken legal title to a certain piece of land in trust for him; that a patent for the land issued to Murphy by the United States be declared null and void and be canceled; that the defendants Batchelder, White, Classen, Beebe, Mitcher, Overholser, The Armstrong Mercantile Company, Land and Lee—Murphy's grantees—be declared to have taken title, subject to the equities, and charged with the trust in favor of McMichael; that all of

these defendants be required to convey to McMichael the portions of the said land to which they held the legal title; that the defendant O'Brien as sheriff of Oklahoma county be restrained from executing certain writs of possession then in his hands for execution and which had been issued by the said district court in actions brought against McMichael by Murphy and White whereby they sought to secure possession of the said land; and that McMichael have any further relief, to which he might be entitled, in the premises (pp. 44-45).

In substance the facts set forth in the petition are these (pp. 25-45):

The land in dispute contains 160 acres, is of the value of more than $20,000, and is described as the southwest quarter of section 7, township 12, north of range 3, West Indian meridian (pp. 26, 44). On April 23, 1889, the defendant Ewers White filed a homestead entry in the local land office at Guthrie, Oklahoma, whereby he undertook to acquire the land (p. 26). On April 24, 1889, one Charley J. Blanchard in the like manner attempted to enter the said land. His application was rejected because of White's entry. On April 27, 1889, he filed an affidavit of contest, charging that White had entered upon and occupied land in the Territory of Oklahoma before such lands were opened for settlement, to-wit, before April 22, 1889, and was disqualified from ever entering or acquiring any such lands by the act of Congress approved March 2, 1889 (25 Stat. F., 980, 1004-1006), and the proclamation of the President (26 Stat. F., 1544) issued pursuant to that act on March 23, 1889 (p. 26). On May 1, 1889, one Vestal S. Cook in like manner made application to enter said land. It was rejected because of White's entry and Blanchard's affidavit of contest. Cook thereupon filed an

affidavit of contest attacking White's entry and Blanchard's contest (p. 26). On July 16, 1889, the contest between White, Blanchard and Cook came on to be heard in the local land office, which on July 19th recommended that White's entry be canceled and the contests of Blanchard and Cook dismissed (p. 27). From this decision the three parties took appeals to the Commissioner of the General Land Office. On March 7, 1890, the Commissioner affirmed the decision of the local office. Further appeals were taken to the Secretary of the Interior (p. 27). On November 28, 1890, while the appeals last mentioned were pending, White relinquished his entry (pp. 29-30). On July 21, 1891, the Secretary affirmed the decision of the Commissioner in so far as it related to the contests of Blanchard and Cook (pp. 31-36; see 13 L. D., 68).

In the mean time McMichael had on May 28, 1889, settled upon the said land peaceably and without force, finding it unenclosed. He was qualified to enter and acquire it as a homestead, and it was his intention to do so. He took with him his wife, family and all of his possessions (p. 26). On July 21, 1889, after the rendition of the decision of the local land office, holding that White, Blanchard and Cook were all disqualified from entering or acquiring the land, McMichael made application to enter it, showing that he had settled upon it, and had in all respects complied with the homestead laws. His application was rejected because of White's entry (p. 27). On August 2, 1889, while plaintiff was in peaceable possession of the land, White entered into a conspiracy with one D. F. Stiles, an officer of the United States Army, then acting as provost marshal at Oklahoma City, for the purpose of cheating and defrauding McMichael and depriving him of the rights which he had acquired by settlement. On the same day, in consequence of

this conspiracy, a body of armed soldiers, acting under the command of Stiles, forcibly and wrongfully ejected McMichael and his family, and White then and thereafter publicly threatened to do McMichael bodily harm if he attempted to return to the land (p. 28). On August 31, 1889, McMichael again made application to enter the land, and tendered the fees therefor prescribed by law. This time his application was *received* by the local land office and marked *suspended pending final action in the contest between White, Blanchard and Cook* (p. 27). At the same time McMichael filed an affidavit of contest, charging that White, Blanchard and Cook had all of them entered the Territory prior to April 22, 1889, and contrary to the law (*supra*), and for that reason were disqualified from acquiring the said land or any other land in the territory. The affidavit related the facts concerning McMichael's settlement upon the land and his application to enter the same and tendered proofs of the facts charged (pp. 27-28). McMichael was given no opportunity to prosecute that contest, although he stood ready to do so.

By reason of his forcible ejectment from the land on August 2, 1889, and by reason of the threats then and thereafter made by the defendant White, McMichael was deprived of the possession of part of the land until November 30, 1890, though he continued to occupy and cultivate a part of it and make claim to the whole of it as a homestead to which he was entitled by virtue of the priority of his settlement and his contest against the pretensions of White, Blanchard and Cook (p. 29). About January 1, 1890, he procured building materials and commenced the construction of a dwelling upon the land. In his temporary absence White, unlawfully and wrongfully burned and destroyed the unfinished building and the materials provided for its

completion, and threatened, openly, to kill McMichael if he should again venture upon the land. Nevertheless, he continued to occupy the land and cultivate and improve it up to the commencement of this suit (p. 29).

Between August 31, 1889, and November 28, 1890, White, realizing that he could not acquire a patent for the land, offered to relinquish his entry if McMichael would pay him $1,000. McMichael refused. White thereupon declared that he could and would find people to acquire title for him, and that McMichael should never acquire any part of the land. Believing that McMichael would prevail in his contest filed August 31, 1889, White entered into a conspiracy with the defendant Murphy for the purpose of defrauding McMichael. Although the contest between White, Blanchard and Cook was still pending before the Secretary of the Interior, White relinquished his entry on November 29, 1890, it being agreed between him and Murphy that simultaneously with the filing of his relinquishment Murphy should enter the land, and that by fraud and purjury he should procure a patent for it, and then convey a large part of it to White (pp. 29-30). In this conspiracy White and Murphy met with success. No sooner had White filed his relinquishment than Murphy filed an application to enter the land. This the local office accepted, immediately, notwithstanding the fact that the officials well knew about the McMichael's settlement, and his application and contest of August 31, 1889, were then on file in their office, marked suspended, pending final action in the case of White, Blanchard and Cook; notwithstanding the fact that the contests of Blanchard and Cook had not been finally passed upon by the Secretary of the Interior, and notwithstanding the fact that there were three other applications then in existence, two of them for homestead entries, accom-

panied by contests, and the third, a soldier's declaratory statement (pp. 28, 30).

Having resumed possession of the whole of the land, on November 30, 1890, or immediately after White's relinquishment, McMichael, on December 4, 1890, made a third application to enter it, tendering the requisite fees. It was rejected because of Murphy's entry. Thereupon McMichael appealed to the Commissioner of the General Land Office, showing that the acceptance of Murphy's entry was wrongful, and an invasion of his preferential rights, acquired by settlement, and contest. Finally the case came on for determination by the Secretary of the Interior, who considered the claims of McMichael, Murphy and several other persons, including one Holt, who had filed a soldier's declaratory statement. The Secretary held (20 L. D., 147) that plaintiff did not acquire any rights by his settlement or his applications, and that his contest against White, Blanchard and Cook was not a contest in a technical sense; also that Murphy's entry was, improperly, received by the local office, because Holt's application was pending on November 29, 1890, and was entitled to priority (pp. 31-36). McMichael in his petition charged that this decision was erroneous in so far as it related to him, and that the Secretary's conclusions were founded upon misconstructions and misapplications of the law (pp. 40-43). Notwithstanding that the Secretary had decided that Holt was entitled to the land, Murphy continued to claim it under his entry, while Holt remained inactive until June 16, 1897. Meanwhile McMichael had filed and proved a contest against Holt, which the local land office had not decided. On June 16, 1897, Murphy made alleged final proofs for the purpose of securing a patent, and at the same time, Holt formally relinquished his rights.

These things were the result of a conspiracy entered into by Murphy and Holt to defraud McMichael and avoid his contest against Holt (pp. 36-37). Murphy had published the fact that on May 10, 1897, he would appear at the local land office and submit his final proofs. On that day McMichael appeared at the office with witnesses, prepared to prove that Murphy had failed to comply with the homestead laws. Murphy failed to appear. McMichael notified the officials of the land office that he was prepared to show that Murphy was not entitled to receive a patent for the land, and wished to be heard when the latter should attempt to offer his final proofs. The officials promised to give him notice of the date set for the hearing. Thereafter without advertisement or publication of any kind, and without any notice, the officials, covertly and by stealth, on June 16, 1897, heard and accepted Murphy's proofs, although they knew them to be false, in that Murphy had not made any improvements upon the land in dispute, as he and his witnesses falsely testified (p. 37). Thereafter the defendant Classen, who was the receiver of the local office, admitted to McMichael that he had not fulfilled his promise to notify the latter of the hearing, because he was a friend of Murphy's. The petition charges that Classen and Murphy had entered into a conspiracy to cheat and defraud McMichael, and that the several acts and omissions of the two in connection with Murphy's final proofs were part and parcel of this conspiracy.

On July 27, 1897, before he had received a patent for the land, Murphy fraudulently conveyed a part thereof, containing 120 acres, to the defendant Batchelder without consideration. This conveyance was part and parcel of the fraudulent scheme whereby White, Murphy and their associates were endeavoring to secure title to the land

and thus to defraud McMichael (p. 38). On January 24, 1898, the day on which Murphy received his patent, he conveyed the same 120 acres to White without consideration as his agreed share of the usufruct of their unlawful and fraudulent transactions above described (p. 38). On May 13, 1899, White conveyed to the defendant Classen, without consideration, the same 120 acres. This, like the conveyance to Batchelder, was made with fraudulent intent (p. 38).

Each one of the defendants, Batchelder, White, Classen, Beebe, Mitcher, Overholser, The Armstrong Mercantile Company, Land and Lee, claimed to own or have an interest in a part of the said land, having acquired the same, directly or indirectly, from Murphy. The petition charged that each of them took title with full knowledge of and subject to McMichael's rights, all of them having been parties to or cognizant of the fraudulent transactions whereby Murphy secured his patent (p. 43).

It is further charged that by reason of the several conspiracies, frauds, perjuries and other unlawful transactions described, McMichael was prevented from acquiring title to the land, by patent from the United States. Also that by reason of the erroneous decisions of the officials of the Land Department and the Secretary of the Interior his preferential rights as settler, entryman, and contestant were denied him, and he was unlawfully deprived thereof (pp. 40-44).

Shortly before the present suit was brought Murphy and White, having brought actions at law against McMichael in the district court seeking to secure possession of certain parts of the land in dispute, obtained judgments. When the petition was filed writs of possession issued pursuant to those judgments were in the hands of the defendant O'Brien, sheriff of Oklahoma county, for execution. McMichael

charged that by reason of his rights, acquired in the manner above described, the execution of those writs would do him wrong and injustice, and asked that execution thereof be restrained (p. 43). After McMichael filed his petition the defendants moved the court to require him to attach thereto the petitions and judgments in the said actions brought against him by White and Murphy (p. 54). This motion was granted. McMichael noted an exception and complied with the court's order (pp. 45-53).

Defendants next filed a demurrer to the petition assigning as grounds thereof (1) that the cause was *res adjudicata* by reason of the judgments in favor of White and Murphy, and (2) that the petition failed to state facts sufficient to constitute a cause of action against the defendants or any of them (p. 55). On plaintiff's motion the court struck out the first ground of the demurrer. No exception was noted by defendants. After hearing, the court sustained the demurrer upon the second ground. Plaintiff elected to stand on his petition, judgment was entered dismissing the case, and he took an appeal to the Supreme Court of Oklahoma. While this appeal was pending McMichael died and the suit was revived in the names of his heirs, the present plaintiffs in error and appellants (p. 56). The Supreme Court of the territory affirmed the judgment of this district court, whereupon the cause was brought up to this court in the manner heretofore described.

SPECIFICATIONS OF ERROR.

The errors of the Supreme Court of the Territory of Oklahoma assigned by the plaintiff in error and appellants and intended to be urged are these:

1. The said court erred in holding that the plaintiff, William T. McMichael, did not, by his settlement upon and improvement of the land in dispute, acquire rights in the same which gave his several applications to enter the same as a homestead, priority over the applications of the defendant Murphy (p. 20, Assignments: second, seventh and eleventh).

2. The said court erred in holding that the application of the plaintiff, William T. McMichael, to enter the land in dispute, as a homestead and his affidavit of contest filed August 31, 1889, did not give him preferential rights as against the defendant Murphy (p. 20, Assignments: second, sixth and seventh).

3. The said court erred in holding that the defendant Murphy and other defendants, his grantees, were entitled to the land in dispute, notwithstanding the fact that they acquired their legal title thereto by means of frauds, conspiracies, perjury, and other unlawful transactions, to which all of them were either parties or privies, by reason whereof the plaintiff McMichael was unlawfully prevented from securing the legal title to the same (pp. 20-21, Assignments: sixth, seventh, ninth, tenth and eleventh).

4. The said court erred in affirming the judgment of the District Court of Oklahoma county whereby it sustained the demurrer to the petition and dismissed plaintiff's suit (pp. 20-21, Assignments: sixth, seventh, ninth, tenth and eleventh).

ARGUMENT.

I.

By his settlement and residence upon the land in dispute the plaintiff McMichael acquired preferential rights therein, and his applications to enter the said land were entitled to priority over the application of the defendant Murphy.

On May 28, 1889, when the plaintiff McMichael settled upon the land in dispute, intending to acquire it under the homestead laws, it was unenclosed. His settlement thereon occurred without resistance or objection. Hence his presence upon the land was not unlawful, and was one which might give rise to preferential rights in his favor, provided, of course, that the pending claims of White, Blanchard and Cook were rejected. (*Marks* v. *Bray*, 1 L. D., 434; *Banks* v. *Smith*, 2 L. D., 44; *Ward* v. *Gann*, *Id.*, 630; Meiszner's Case, 8 L. D., 237.)

When he made his settlement McMichael knew that the contest between the persons named was pending in the local land office, and while he believed that none of them was qualified to acquire the land, he made no attempt to enter it until July 21, 1889, when that contest had been heard and decided. Nevertheless, with the full intention of securing the land, he had established himself upon it, taking with him his family and all of his belongings. By the decision rendered on July 19, 1889, White's entry was held for cancellation and the contests of Blanchard and Cook were dismissed, it appearing that each one of them had resided in the territory of Oklahoma before lands therein were opened for settlement in violation of the act of March 1, 1889 (*25 Stat. L., 757, 759*), and of the explicit and em-

phatic prohibition of the proclamation of the President, issued March 23, 1889 (26 *Stat. L.*, *1544*, *1545*), and therefore all of them were, for all time, disqualified from entering or acquiring any lands in the territory. Believing that the effect of this decision was to restore the land to the public domain and render it free for entry, McMichael, on July 21, 1889, made his first application for a homestead entry. This application was rejected, yet believing that his settlement entitled him to secure the land for a home, McMichael continued to reside thereon. It was not until August 2, 1889, that he met with any opposition or objection. On that day he was forcibly ejected by military authority. The armed force that dispossessed him acted under the command of one Stiles, a captain in the United States Army, who had entered into a conspiracy with the defendant White to oust McMichael, interrupt his residence and ultimately defraud him of his rights gained by priority of settlement. The court below erred in saying (p. 68) that it would assume that Stiles acted properly and in accordance with law. We have, in the petition, which, for purposes of this hearing, is our sole source of information as to the facts, the charge, explicitly made, that the intervention of Stiles was the result of an unlawful conspiracy, entered into by him and the defendant White, for the purpose of defrauding McMichael. From the decision of the local land office White had taken an appeal to the Commissioner. He knew that by express provision of the statute and proclamation, he was disqualified from entering the land and could not acquire it; but had not given up the hope of getting the greater part of it, indirectly and by means of fraud. He required time to develop and perfect his plans and secure confederates. In the meantime he did not wish McMichael's settlement to ripen into a preferential right, which would

supersede the claim of the puppet, whom he would choose to enter the land and procure a patent for his benefit.

The Secretary of the Interior held erroneously (*20 L. D., 147*) that McMichael's residence was not continuous, and that he was not, in contemplation of law, a settler upon the land between August 2, 1889, and November 30, 1890, and was not entitled to the preference accorded to settlers when on November 29, 1890, White's relinquishment was filed. In spite of his forcible ejectment McMichael never relinquished the actual possession of part of the land, and never ceased to claim that he was entitled to acquire the whole of it as a homestead. Under these circumstances he was, in contemplation of law, in possession of and a settler upon the land from May 28, 1889, continuously throughout the period covered by the transactions described in his petition. His temporary absence from part of the land, wrongfully compelled by military force and induced by intimidation, did not break the continuity of his residence. If McMichael had, in fact, been absent from the land at the time of White's relinquishment and Murphy's entry, he would nevertheless have been entitled to priority over Murphy by virtue of his settlement and residence. (*Dorgan* v. *Pitt*, 6 L. D., 616; *Pfister* v. *Boyer*, 19 L. D., 178; *Arnold* v. *Cooly*, 10 L. D., 551; *Smith* v. *Place*, 13 L. D., 214; *Reedhead* v. *Hauenstine*, 15 L. D., 554; *Kinman* v. *Appleby*, 32 L. D., 526.)

McMichael not only resided upon the land continuously, but insofar as he could, notwithstanding the lawless acts of White, he cultivated and improved it. No improvements of any consequence were made by anyone else.

There was no abandonment by McMichael of any rights that he had gained. On the contrary, on August 31, 1889, he made a second application to enter the land in dispute,

tendering the proper fees for the making of such an entry, and in other respects offering to comply with all requirements of the homestead laws. This entry was *received* by the local land office and marked: suspended, pending final action in the contest between White, Blanchard and Cook. Final action in that case, cancelling White's entry because of his disqualification, was only prevented by the relinquishment of his entry made on November 29, 1890.

Forthwith, upon the filing of White's relinquishment, the preferential rights acquired by McMichael through settlement and residence attached to the land. His application to enter it, which he had filed on August 31, 1889, and which had since remained in the local office awaiting only the removal of White's entry from the records, should at once have been accepted and entered. Again, McMichael's preferential rights extended to the filing of a new entry within thirty days from the filing of the relinquishment. (Act May 14, 1880, 21 Stat. L., 140.) He did file a new and his third application on December 4, 1890. That should have been received. Its rejection because of Murphy's entry, made contemporaneously with White's relinquishment, was wrong. Murphy made no pretence of being a settler, resident, contestant, or anything but a stranger so far as the land was concerned.

This court in recent opinions has reviewed the homestead laws, considering their purport and policy. Several of these deal with the rights of *bona fide* settlers as against those of mere entrymen, even such as Murphy. They show that McMichael gained the right to enter and acquire the land, and of that right was wrongfully deprived. (*Moss* v. *Dowman*, 176 U. S., 413; *Bohall* v. *Dilla*, 114 U. S., 47; *Quinby* v. *Conlan*, 104 U. S., 420; *Stone* v. *Cowles*, 14 L. D., 90; *Hunter* v. *Blodgett*, 20 L. D., 452; *Rickers* v. *Tisher*, 19 L. D., 421.)

II.

By his contest filed August 31, 1889, by which he attacked the entry of the defendant White and the claims of Blanchard, the plaintiff McMichael acquired preferential rights, and both his application to enter the land in dispute, made at that time and the one made by him on December 4, 1890, were entitled to priority over the application of the defendant Murphy.

It was provided by Section 2 of the Act of May 14, 1880 (*supra*):

> "In all cases where any person has contested, paid the land office fees, and procured the cancellation of any preemption, homestead or timber culture entry he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from the date of which notice to enter said lands, provided that said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported."

Along with his application to enter the land in dispute, filed on August 31, 1889, McMichael presented an affidavit, whereby he contested the validity of White's entry and the pretensions advanced by Cook and Blanchard. The law prescribes no particular form for contests challenging the validity of homestead entries. The Land Office Circular (1899, p. 301) gives a form for affidavits to be filed before contest, according to which a contestant need do no more than declare upon oath, that he is acquainted with the land embraced in the entry attacked; that he is prepared to prove at such time and place as the officials of the local land office may designate, facts, which will lead to the

cancellation and forfeiture of the entry, and that he will pay the cost of the hearing. McMichael's affidavit may have been prolix, but it contained all of the averments indicated by the department's form as essential to the institution of a contest. He could do no more than file the paper and tender the fee. It was for the register and receiver of the local office to designate a time for hearing. They never did so and never gave McMichael an opportunity to submit his proofs. Speaking of this contest the Secretary of the Interior said (*McMichael* v. *Murphy*, 20 L. D., 147):

> "The protest I have examined with care. It was filed not long after the local land office held White's entry for cancellation and refers to that fact. It sets forth the entire history of the tract from the opening of the territory down to the date said instrument was filed. It declares the entry of White to be void and the claims of Blanchard and Cook of no effect for reasons hereinbefore stated. It asserts that McMichael's claim to the land is paramount to all others by reason of his settlement as above set forth. It recites the ejectment of McMichael from said tract by the military at the instigation of said White, and that he is kept off said tract by White's threats and intimidation. After giving an account of McMichael's application to make homestead entry on July 19, 1889, it stated that affiant thereafter tendered his application and affidavit to enter said land, and now asks that when said entry of White be canceled that they be received and filed by the United States land office and a certificate be issued to him by the receiver. He then protests against any other person being permitted to enter said land, and requests that if such attempt is made, that a hearing as to affiant's rights be had, and that he be awarded the right to enter said land. Such is the instrument which McMichael claims caused White's relinquishment and entitled him to the preference right of entry as against Murphy. It is *an information, a declaration, a protest and a prayer.*"

Notwithstanding this admission that the affidavit recited all facts essential to the initiation of a contest, the Secretary held that it had not the legal effect of a contest. Clearly he erred in taking so narrow and technical a view of the matter.

If the present case, like that of *Hodges* v. *Colcord* (193 U. S., 192), involved the rights of two contestants, there would be occasion for an inquiry as to which of them actually procured the cancellation of the earlier entry. But here we have no issue of that kind. We have on the one hand McMichael, whose settlement and residence dated back for eighteen months prior to Murphy's application, and whose contest dated back for fifteen months prior thereto; and on the other hand Murphy, who was an absolute stranger. It must be remembered that when Murphy applied to enter the land, McMichael's contest was on file in the local land office, marked suspended, pending final action in the contest of White, Blanchard and Cook. It is true that on account of the non-action of the local land office, McMichael's contest had not been given a hearing. But McMichael charges that it was his contest which induced White to relinquish his entry. White's offer to do so if McMichael would pay him $1,000, is specific proof that such was the case. Under these circumstances there were but two things which the local land office could lawfully have done: (1) allowed McMichael a period of thirty days wherein to perfect his entry after giving him notice of White's relinquishment (Act of May 14, 1880, *supra*), or (2) awaited the Secretary's decision on the contests of Blanchard and Cook to see whether either of them would be sustained, and in that event have given McMichael a hearing upon his contest, and allow him, if successful, a period of thirty days to perfect his entry, after notice of the Secretary's

decision. The acceptance of Murphy's entry, contemporaneously with the filing of White's relinquishment amounted to a total disregard of the preferential rights which McMichael had acquired. (*McClung* v. *Penny*, 189 U. S., 143, 147.)

III.

The several frauds, conspiracies, perjuries and other unlawful transactions by which the defendant Murphy secured the legal title to the land in dispute and prevented the plaintiff, McMichael, from securing the same rendered Murphy's title void as against McMichael. All of the defendants, having been either parties to these unlawful transactions, or privy thereto, must be regarded as having taken, and as holding the legal title, as trustees for McMichael, and should be compelled to convey the said land to his heirs (plaintiffs in error and appellants).

It is unnecessary to recount the frauds, conspiracies and perjuries by which White and Murphy and their confederates, among whom were an official of the local land office and an officer of the United States Army, succeeded in procuring a patent for Murphy, and thereby defrauded McMichael. In the statement of the case we have described those transactions at length, and have shown that their ultimate effect was to secure from the United States, for White, the legal title to three-fourths of the land, although the statute and the proclamation of the President (*supra*) declared that such as he should never enter or acquire any lands in Oklahoma; also that the patent procured by fraud and perjury had been the means by which White and Mur-

phy had obtained judgments of ejectment against McMichael, and they were on the point of ousting him, although he, as the first qualified settler, and the first, if not the only honest applicant, contestant and resident, was justly entitled to the land.

Under these circumstances McMichael's remedy was by petition to a court of equity for the securing and protection of his rights, which were not cognizable by a court of law. He was entitled (1) to have it adjudged that Murphy and his grantees took title as trustees for him, (2) to a decree compelling the defendants to convey the land to him, and (3) to an injunction restraining the execution of the judgments of ejectment. (*Johnson* v. *Towsley*, 13 Wall., 72; *Moore* v. *Robbins*, 96 U. S., 513; *Warren* v. *Van Brunt*, 19 Wall., 646; *Re Emblen*, 161 U. S., 52; *Starke* v. *Storrs*, 6 Wall., 402; *Lytle* v. *Arkansas*, 22 How., 193; *Garland* v. *Wynne*, 20 How., 6; *Lindsey* v. *Hawes*, 2 Black, 554; *Brush* v. *Ware*, 15 Peters, 93; *Bodley* v. *Taylor*, 5 Cranch, 191; *Polk* v. *Wendell*, 5 Wheat., 293; *U. S.* v. *Maxwell*, 121 U. S., 325; *Sanford* v. *Sanford*, 139 U. S., 642.)

Frauds, such as those, specifically disclosed, by the petition, vitiate all transactions based thereon and destroy any asserted title to property, no matter in what form the evidence of such title may exist, even though the same be a patent issued by the United States. (*U. S.* v. *Steenerson*, 50 Fed. R., 507; *American Mortgage Co.* v. *Hoffer*, 64 Fed. R., 558.)

A patent procured by perjury such as that of the defendant Murphy when he falsely declared that he had resided upon and improved the land, and so complied with the homestead laws, is sufficient ground for the vacation and annulling of his patent, in the manner prayed by McMichael. (*U. S.* v. *Minor*, 114 U. S., 233.)

IV.

The demurrer to the petition should have been overruled by the District Court of Oklahoma County.

We have to deal with the defendants' second ground of demurrer alone. That is, to inquire whether the facts, set forth in McMichael's petition, constituted grounds for suit against the defendants, and whether upon proof of those facts the plaintiffs in error and appellants would be entitled to the relief prayed by the petition. In the preceding branches of this argument we have shown that the petition did recite facts amply sufficient for those purposes, and that the courts below erred in holding to the contrary.

The question raised by the defendant's first ground of demurrer is not before this court, but mention of it may be made by the defendant in error. They wished to set up the defense of *res adjudicata,* founded upon the judgments of ejectment obtained by White and Murphy against McMichael. To furnish foundation for that defense they asked for and obtained an order of the district court by which McMichael was required to attach to his petition transcripts of records in the actions at law brought against him by White and Murphy. McMichael noted an exception, but obeyed the order. Notwithstanding the fact that those records appear as exhibits attached to the petition, the defense of *res adjudicata* cannot be considered here. On plaintiff's motion defendant's first ground of demurrer was stricken out, and the defendants neither noted an objection nor did they take a cross appeal. The propriety of that ruling was not questioned in the court below. It cannot be questioned here. (*Morril* v. *Jones,* 106 U. S., 466, 467; *McLaughlin* v. *Bank,* 7 How'd., 220; *Fashnacht* v. *Frank,* 23 Wall., 416; *Bradstreet* v. *Potter,* 16 Pet., 317, 318.) Again, the defense of *res adjudicata* cannot be

raised by demurrer, but only by plea or answer. (*Statutes of Oklahoma*, 1893, Secs. 3967, 3969;* 9 *Am. & Enc. Pleading & Practice*, 611 *et seq.*) Again, the judgments obtained by White and Murphy do not furnish grounds for the defense of *res adjudicata*.

Each one of them was rendered in an action at law whereby White or Murphy sought to obtain possession of a portion of the land in dispute. In each case, properly enough, the District Court founded its judgment upon the patent from the United States which conferred upon Murphy and White, his grantee, the legal title to the land. In neither action was it competent for McMichael to set up, or for the court to consider, his equitable rights, which were, for the first time, drawn in question by the present suit. Hence the judgments did not deal with the subject matter of this controversy, and can have no effect upon it. (*2 Black on Judgments, 693; Apsden* v. *Nixon*, 4 How., 467.)

On examination of the records in the actions of *White* v. *McMichael* and *Murphy* v. *McMichael* it will be seen that the verdict in each was simply that the plaintiff was entitled to the possession of certain land. The judgments on these verdicts indicate that the court attempted to establish the plaintiff's title to the land. If so, the judgments are void, for a judgment cannot award remedies in excess of those called for by verdict. (*Statutes of Oklahoma*, 1893, Sec. 4300;* *Everett* v. *Aikens*, 8 Okla., 184; *Commissioners* v. *Moon*, I. D., 205; *Kidd* v. *Territory*, 9 Okla., 450.)

We submit that the judgment of the court below should be reversed.

JOS. K. McCAMMON,
JAMES H. HAYDEN,
FRANK CLARK,
Of counsel for Plaintiffs in Error and Appellants.

*See Appendix.

APPENDIX.

The Statutes of Oklahoma, 1893:

"(3967) Sec. 89. The defendant may demur to the petition only when it appears on its face, either: *First,* That the court has no jurisdiction of the person of the defendant, or the subject of the action. *Second,* That the plaintiff has no legal capacity to sue. *Third,* That there is another action pending between the same parties for the same cause. *Fourth,* That there is a defect of parties, plaintiff or defendant. *Fifth,* That several causes of action are improperly joined. *Sixth,* That the petition does not state facts sufficient to constitute a cause of action."

"(3969) Sec. 91. When any of the defects enumerated in section eighty-nine do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action."

"(4300) Sec. 422. When a trial by jury has been had, judgment must be entered by the clerk in conformity to the verdict, unless it is special, or the court order the case to be reserved for future argument or consideration."

IN THE

SUPREME COURT

OF THE

UNITED STATES

WALTER S. MCMICHAEL, ET AL,

Plaintiffs in Error and Appellants.

vs.

SAMUEL MURPHY, ET AL.

Appellees.

No. 166

October Term, 1904.

BRIEF OF DEFENDANTS IN ERROR.

The relief sought in this case is the declaration of a resulting trust in favor of the appellants and against the appellees. The appellants base their claims to the relief prayed for as the heirs of one William T. McMichael, deceased, and upon proceedings had in the Department of the Interior and its subordinate bureau, affecting the Southwest Quarter (SW. ¼) of Section Twenty-seven (27), Township Twelve (12), North of Range

Three (3) West of the Indian Meridian, in the Oklahoma City Land District. Title to this tract of land was derived by the principal defendant, Samuel Murphy, under the homestead laws of the United States, a final receipt being issued on the 20th day of May, 1897, and patent being thereafter issued.

The original petition in the court below sets out the final decision of the Secretary of the Interior adverse to the said William T. McMichael, and alleges and asserts that there were certain errors of law in said decision, that the law applicable to the facts had been misconstrued and misapplied, and attempts to show that under the law properly administered the land in contest should have been awarded to the complainant, McMichael.

The facts as found by the Secretary in the proceeding before the Interior Department are final, conclusive and binding upon the parties, and the courts will not undertake to retry such questions of fact.

Lee vs. Johnson, 116 *U. S.*, 48.
Johnson vs. Towsley, 13 *Wall*, 72.
Marquez vs. Frisbie, 101 *U. S.*, 473.
Quinby vs. Conlan, 104 *U. S.* 420.
Baldwin vs. Starks, 107, *U. S.*, 463.

The findings of fact made by the Secretary and printed on pages 31, 32, 33, 34, 35 and 36, are summarized on page 62 of the record herein, by the Supreme Court of the Territory of Oklahoma, and said statement is so full and succinct that counsel will not repeat it here.

We think that but two propositions are presented under the record.

First, did McMichael gain any rights under the homestead laws of the United States by his forcible intrusion upon the land in question while it was covered by the uncancelled entry of White?

Second, does not the petition of the appellants originally filed in the District Court of Oklahoma County, show that such action was barred by former adjudication and should not the trial court have sustained the demurrer on this gound also, and under the general demurrer, even if the special ground of demurrer was not recognized by the statute?

The findings of fact by the Secretary concerning the settlement of McMichael were as follows, to-wit:

"McMichael based his claim upon his alleged settlement on the tract in May or June, 1889, while it was covered by White's homestead entry; that White, Blanchard and Cook were all disqualified by reason of having entered the Territory during the prohibited period; that White's entry was therefore void; McMichael the first qualified settler on the tract, and that White's relinquishment was filed because of his protest affidavit, filed in August, 1889, and that Murphy's entry is void because in violation of rule of practice No. 53.

Holt based his claim on his application filed March 11, 1890, four days after the decision of your office, holding White's entry for cancellation, and before appeal was taken therefrom.

Murphy's claim is based solely on his entry, made November 29, 1890, on the filing of White's relinquishment.

Although White had entered the Oklahoma country during the prohibited period, yet his homestead entry was prima facie valid, its invalidity had to be established by extraneous evi-

dence and a judgment as to its illegality pronounced by a competent tribunal. Had that never been done the tract covered by said entry would have remained forever segregated from the public domain; so far at least as the unquestioned legality of the entry itself could accomplish that fact, hence it cannot be regarded as void but voidable only. If voidable only, White's entry segregated the land so long as it remained of record. Hence he was entitled to its possession, it being exempt from further settlement or entry, until his entry was cancelled or declared forfeited.

McMichael's settlement on the tract in question in May or June, 1889, while it was covered by the homestead entry of White gave him no rights whatever as against either White or the Government. McMichael was not on the tract when White's entry was cancelled. He cannot be heard to say that he was deprived of any right on account of his ejectment by White because he had none to lose. He was a trespasser on the tract and White had a right to eject him therefrom.

Hence he can acquire no right whatever by virtue of his alleged settlement. Had White permitted him to remain on the tract, and had he been residing there when White's entry was cancelled a different question would be presented. When White therefore filed his relinquishment November 29, 1890, McMichael had no right or legal claim whatever to said tract, unless that relinquishment was caused by McMichael's protest filed August 31, 1889, which would have entitled him to the preference right of entry. This brings us to the examination of that question."

The land department held on the above statement of facts, that the claimant, McMichael, had gone upon land segregated by the entry of White and in the lawful occupation and possession of White, and that such settlement was accomplished by a forcible trespass and that as a matter of law it conferred no right of homestead upon McMichael; that McMichael was rightfully ejected by the only authority then having jurisdiction in Oklahoma, to-wit: the military arm of the Government, and that his resumption of residence after the interposition of Murphy's rights acquired by homestead entry at the proper land office, did not relate back to McMichael's initial acts and make him a settler upon the land at the time White's entry was relinquished.

It is contended by the appellants that this conclusion of law on the part of the Secretary of the Interior was wrong. It is urged by appellants that the homestead entry of White was void ab initio and did not segregate the land so as to preclude the settlement of McMichael for the reason that White had entered the Oklahoma Country in disregard of the Act of Congress, approved March 2, 1889, and the President's Proclamation thereunder, of date March 23, 1889, which provided that said lands should not be open to settlement and entry until 12 o'clock noon, of April 22, 1889, and provided as a penalty for such violation that "no person violating this provision shall ever be permitted to enter these lands or acquire any right thereto."

This theory of the appellants that a homestead entry prima facie valid did not operate to segregate lands therein embraced, from the public domain, was carefully considered by the Supreme

Court of the Territory of Oklahoma, in its opinion in this case, and was one of the two specific propositions of law decided by the court. The decisions of the Supreme Court of the United States cited in the opinon of the Supreme Court of Oklahoma, are final and conclusive on the proposition that homestead entry once made upon public land of the United States under the provisions of Sections 2289 and 2290 of the Revised Statutes of the United States segregates such lands until finally cancelled, and unless the Act of March 2, 1889, operates to change the ordinary rule with respect to the effect of a homestead entry, these decisons by this court, apply to the case at bar.

See Chotard vs. Pope, 12 *Wheaton*, 586.
Wilcox vs. Jackson, 13 *Peters*, 493.
Carroll vs. Safford, 3rd *Howard*, 441.
Witherspoon vs. Duncan, 4th *Wall.*, 210.
Pacific R. R. Co. vs. Dunemeyer, 113 *U. S.*, 620.
Hastings & Dakota R. R. Co. vs. Whitney, 132 *U. S.*, 357.
Sturr vs. Beck, 133 *U. S.*, 541.
Sioux City & Iowa Falls vs. Griffey, 143 *U. S.*, 40.
Sioux City & Iowa Falls R. R. Co. vs. Griffey, 143, *U. S.*, 40.
Whitney vs. Taylor, 158, *U. S.*, 65.

The land department of the United States has repeatedly passed upon the same question and has in all cases held that a homestead entry prima facie valid segregates the tract of land therein described, until such entry is cancelled, either by relinquishment or by the Government.

See Graham vs. Hastings & D. R. R. Co., 1st *L. D.*, *p.* 362.
Whitney vs. Maxwell, 2nd *L. D.*, *p.* 98.

Seary vs. Manuel, 12th L. D., p. 345.
Vidal vs. Bennis, 22nd L. D., p. 124.
Cowles vs. Huff, 24th L. D., p. 31.

In Hodges vs. Colcord, 193 U. S., pages 191-193, (Vol. 48, Law Ed. Pages 677-679) this court passes squarely upon this identical proposition, and in the body of said case cites and approves the decision of the Secretary in McMichael vs. Murphy, which appellants attack by this proceeding. In the body of the case, the court says: "But it is unnecessary to multiply quotations. The entry of Gayman, though ineffectual to vest any rights in him, and therefore void as to him, was such an entry as prevented the acquisition of homestead rights by another until it had been set aside."

It appears to be thoroughly well settled by the decisions of this court that the remaining proposition decided by the Supreme Court of the Terrtory of Oklahoma, in the case at bar, was correctly decided by said court. This proposition was stated in the syallabus of said case as follows: (Page 62 of the record.)

"One who makes settlement on a tract of land while it is covered by the homestead entry of another, is a mere intruder, a naked, unlawful trespasser, and no right either in law or equity can be founded thereon."

In the case of Atherton vs. Fowler, 6th Otto, pages 513-520, the Supreme Court of the United States held that,

"1. No right of pre-emption can be established by a settlement and improvement on public lands where the claimant has

obtained possession by breaking into the enclosure of one who has already settled upon, improved and enclosed the same land.

"2. Such an intrusion, although made under pretense of pre-empting the land, is but a naked, unlawful trespass, and cannot initiate a right of pre-emption."

In the case of Hosmer vs. Wallace, this court cited and approved Atherton vs. Fowler, and says that,

"The right to make a settlement is to be exercised on unsettled land; the right to make improvements is to be exercised on unimproved land; and the right to erect a dwelling house is to be exercised on vacant land. None of these things can be done on land when it is occupied and used by others."

In Quinby vs. Conlan, 104 U. S., 420-427, the court says:

"Syllabus. A settlement cannot be made upon public land already occupied. As against existing occupants the settlement of another is ineffectual to establish a pre-emptive right."

Of like tenor are the decisions of the Land Department.

See Hudson vs. Docking, 4th L. D., p. 501.
Turner vs. Bumgardner, 5th L. D., p. 377.
Dutcher vs. Tillinghast, 13th L. D. p. 209.
Lewis vs. Nuckolls, 18th L. D., p. 326.
Tustin vs. Adams, 22nd L. D., p. 266.

It appears evident that McMichael gained no right by his settlement on the land in controversy, under the facts found by the Secretary and in the light of the decisions before cited, and inasmuch as the Secretary of the Interior also found that Mc-

Michael was not entitled to the status of a contestant under the second section of the Act of May 14,1880, the plaintiffs are in no condition to complain of the action of the Land Department in awarding a patent to Murphy.

"To entitle a party to relief in equity against a patent of the Government, he must show a better right to the land than the patentee. It must appear by the law properly administered, that title should have been awarded to the claimant."

Sparks vs. Pierce, 115 *U. S.*, 408.
Bohall vs. Dilla, 114 *U. S.*, 47.
Lee vs. Johnson, 116 *U. S.*, 48.

Inasmuch as McMichael gained no vested right by the residence and improvement founded upon his forcible intrusion, in the first instance, when the land was covered by the entry of White, and in the second instance, after the land had been segregated by the entry of Murphy, his bill shows a fatal lack of equity.

Parker vs. Lynch, 7th *Oklahoma*, 634 (56th *Pac. Rep.* 1081.)

The appellees also urge that the general demurrer filed in this case, should have been sustained by the trial court and the Supreme Court of the Territory of Oklahoma, for the reason that the petition of the plaintiff in the court below, as amended by order of the court, shows that this action is fully barred by former adjudication. The petition of the plaintiff, William T. McMichael, in the court below, as amended, is found on pages 25 to 54 inclusive.

Exhibit "A" attached to said petition, found on page 46, being the suit of Ewers White in ejectment for the possession of 120 acres of this land, and exhibit "E", found on page 50 of the record, being a suit in ejectment by Samuel Murphy against McMichael for the possession of the remaining 40 acres, together with the copies of the journal entries in both of said cases, showing final judgment in ejectment in favor of the plaintiffs in both suits, give ample foundation for the position taken by counsel, that the estoppel by said former adjudication appears plainly upon the face of plaintiff's petition. Where this is so the defense may be made by demurrer.

See Vol. 9, page 13, Enc. Plead. & Practice, Greenup et al. vs. Crooks et al., 50th Ind., pages 410-422.

This case cites and approves former holdings of the Supreme Court of Indiana of like effect.

See Trimble vs. the State, 4th Blackf. 435.
Sammons vs. Newman, 27th Ind., 508.
German Mut. Ins. Co. vs. Grim, 32nd Ind., 249.

In Williams et al., vs. Cheatham, the Supreme Court of Georgia made a similar holding. (25 S. E. R. p. 698.)

See Davis vs. Hall, 4th Jones Eq. (N. Car.) page 403 ~~(25 S. E. Rep. 698.~~

Both of the petitions plead by McMichael in the court below contained the statutory averments in ejectment cases, found in Article 24, page 1106, Vol. 1, Wilson's Annotated Statutes of Oklahoma Territory. The whole code of civil procedure of

Oklahoma having been adopted from Kansas; the interpretation placed upon said code by the Supreme Court of Kansas is also adopted, and under the rule laid down by the Kansas Supreme Court, any defense either legal or equitable may be raised under a general denial by the defendant in ejectment suit.

Clayton vs. School District, 20 *Kans.*, 256.
Hall vs. Dodge, 18 *Kans.*, 277.

It is immaterial whether McMichael did in fact plead as a defense the particular cause of action in equity set up in the suit at bar, but it is sufficient if he might have done so.

The dates of these actions in the District Court brought against McMichael in ejectment, are respectively, November 2, 1809, and January 27, 1808, and the allegations of plaintiff's petition in the case at bar are that Samuel Murphy acquired title to said land on the 20th day of May, 1807, and it thus appears that McMichael had the same pretended title when these two actions in ejectment were begun and concluded, that he now attempts to set up as a cause of action in the case at bar.

The Supreme Court of Kansas has repeatedly held that a general finding and judgment in an action of ejectment concludes a party on the question of title and prevents him from thereafter asserting a claim of title from whatever source it comes, which he had, pending the action and prior to the judgment.

See Peterson vs. Albach, 32 *Pac.*, 917.
Hentig vs. Redeu 26, *Pac.*, 701.

See also Redden vs. Metzger, 26 Pac., 689.

County Commissioners vs. Welch et al., 20 Pac., 483.

See also the decisions of the Supreme Court of the United States in the following cases:

Aurora vs. West, 7th Wall, 82.

Washington A. & G. Steam Packet Co. vs. Sickles, 24 Howard, 333.

Stockton vs. Ford, 18th Howard, 418.

The only questions which could have been decided in the former suits in ejectment was the title of the plaintiffs as against the title claimed by the defendant there, plaintiff in the case at bar, and as we have already shown the common law rule in ejectment cases, that the verdict and judgment in ejectment is not conclusive as in other actions, is modified by the rule applicable to the Oklahoma Statute under the decisions of the Supreme Court of the State of Kansas, supra.

For these reasons counsel urges that the decision of the Supreme Court of the Territory sustaining the demurrer, was correct and should be affirmed by this court.

Respectfully submitted,

J. H. EVEREST,

Attorney for Defendants in Error.

Supreme Court of the United States.

No. 166.—October Term, 1904.

Walter S. McMichael, Lillian M. Harris, Lulu F. McGee, et al., Plaintiffs in Error and Appellants, vs. Samuel Murphy, Louisa Murphy, his wife; Ferdinand Batchelder, et al.	In error to and appeal from the Supreme Court of the Territory of Oklahoma.

[April 3d 1905.]

Mr. Justice Harlan delivered the opinion of the Court.

The facts in this case may be summarized as follows:

On April 23d, April 24th and May 1st 1889 White, Blanchard and Cook, respectively and in the order named, applied, at the United States Land Office in Guthrie, Oklahoma Territory, to make a homestead entry on certain lands, being part of the Southwest ¼ of Section 27, Township 12, north of range 3 west. The applications of Blanchard and Cook were each rejected, as being in conflict with White's entry. On April the 27th 1889 Blanchard filed his affidavit of contest, charging that White entered the Territory prior to twelve o'clock noon of April the 22d 1889, in violation of the act of Congress approved March 2d 1889, 25 *Stat.* 1004, c. 412, and the President's proclamation issued under that act. 26 *Stat.* 1544. On May 1st ~~1889~~ Cook also filed an affidavit of contest against White, alleging the latter's disqualification, as above stated, to enter the land, and also that Blanchard was also disqualified upon the same grounds as those alleged in reference to White.

The contest having been tried before the local land office—each party charging that the other two had entered the Territory prior to noon of April 22d 1889—the Register and Receiver recommended the cancellation of White's entry, and dismissed the contest of both Blanchard and Cook. From this decision all parties appealed to the Commissioner of the General Land Office, and on March 7th 1890 the decision of the local office was affirmed. An appeal was then taken to the Secretary of the Interior. While the case was pending before that officer, namely, on November 29th 1890, White of record relinquished his entry, and Murphy, the defendant, on the same day, entered the land. The Secretary of the Interior, July 21st 1891, affirmed the decision of the Commissioner of the General Land Office. *Blanchard* v. *White*, 13 *L. D.* 66.

On or about June 3d 1889, White's homestead entry *being still intact, of record*, McMichael entered upo the land with a view of establishing

his residence thereon and initiating a homestead right to it; and on July 21st 1889 he made application to the local office to enter the land, tendering the required fees; but his application was rejected by the local office as being in conflict with White's entry. From that order no appeal was taken.

On August 31st 1889 McMichael again tendered his application to the local office with the required fees. That application was received, but it was suspended pending the contest of White, Blanchard and Cook. On the day last named McMichael filed a contest or protest, alleging that he had made settlement on the land on June 3d 1889, had lived there in a tent with his family until August 2d 1889, when, at the instance of White, he was forcibly removed therefrom by the military authorities; that his rights were superior to those of White, Blanchard and Cook, all of whom, he alleged, were disqualified by reason of having entered the Territory during the period prohibited by law; that his application of June 3d was rejected because it conflicted with White's interests, although he was the only qualified settler on the tract entitled to make entry. The case, as between McMichael and Murphy, having been heard on February 15th 1892 a decision was rendered in favor of the latter. Thereupon McMichael appealed to the General Land Office which, on January 18th 1893, affirmed the decision of the local office. He then appealed to the Secretary of the Interior, and that officer, on February 25th 1895, affirmed the decision of the Land Office. *McMichael* v. *Murphy*, 20 *L. D.* 147.

A patent was issued to Murphy for the land; whereupon the present action was brought in the District Court of Oklahoma County by McMichael against Murphy and his grantees, the relief asked being a decree declaring the legal title to be held in trust for the use and benefit of McMichael. Murphy demurred on the ground that the petition did not state facts sufficient to constitute a cause of action—McMichael's claim being that the Secretary of the Interior had misconstrued and misapplied the law. The demurrer was sustained, and the plaintiff having elected to stand on his petition the court dismissed the case. From that decree the plaintiff brings the case here for review.

After the cause was entered in the Supreme Court of the Territory McMichael died and the cause was revived in the name of his heirs.

The particular question involved in this case is whether a settlement or entry on public land already covered of record by another entry, valid upon its face, gives the second entryman any right in the land, notwithstanding the first entry may subsequently be relinquished or be ascertained to be invalid by reason of facts dehors the record of such entry.

By virtue of the authority vested in him by acts of Congress, particularly by the Indian Appropriation act of March 2d 1889, 25 *Stat.* 1004,

c. 412, the President by Proclamation dated March 23d 1889 declared that certain lands theretofore obtained from Indians (among which were those in dispute) would "at and after the hour of twelve o'clock, noon, of April 22d 1889, and not before, be open for settlement, under the terms of, and subject to, all the conditions, limitations and restrictions" contained in the above act and in the laws of the United States applicable thereto. 26 *Stat.* 1544. That Proclamation contains the following clause: "Warning is hereby again expressly given, that no person entering upon and occupying said lands before said hour of twelve o'clock, noon, of the twenty-second day of April, A. D. eighteen hundred and eighty-nine, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto; and that the officers of the United States will be required to strictly enforce the provision of the act of Congress to the above effect." 26 *Stat.* 1544–6.

It may be assumed, for the purpose of this case, that White entered the Territory and occupied the land before noon of April 22d 1889 in violation of the act of Congress and the Proclamation of the President. But his entry did not, on its face or in the papers connected therewith, disclose the fact of his personal disqualification to make a valid entry. While the entry remained uncancelled of record by any direct action of the Land Office or by relinquishment, could another person, by making an entry, acquire a right in the land upon which a patent could be based? If not, then McMichael acquired no right by his entry or application to enter.

The Supreme Court of the Territory held that White's homestead entry was *prima facie* valid, and that so long as White's entry remained uncancelled of record it segregated the tract of land from the mass of the public domain and precluded McMichael from acquiring an inceptive right thereto by virtue of his alleged settlement.

We are of opinion that there was no error in this ruling. It is supported by the adjudged cases. *Kansas Pacific Ry. Co.* v. *Dunmeyer*, 113 *U. S.* 629; *Hastings &c. R. R.* v. *Whitney*, 132 *U. S.* 357, 361–2; *Sioux City &c. Land Company*, 143 *U. S.* 32, 38; *Whitney* v. *Taylor*, 158 *U. S.* 85, 91–94; *Northern Pacific Railroad Co.* v. *Sanders*, 166 *U. S.* 620, 631–2; *Northern Pacific Railway* v. *De Lacey*, 174 *U. S.* 622, 634–5; and *Hodges* v. *Colcord*, 193 *U. S.* 192, 194–6.

In the last named case the question now before us was directly presented and decided. It was there alleged that one Gayman, who had made a homestead entry, was disqualified by reason of his having entered the Territory of Oklahoma in violation of the above act of Congress and the Proclamation of the President. The court said: "Gayman's homestead entry was *prima facie* valid. There was nothing on the face of the record to show that he had entered the territory prior to the time fixed for the opening thereof for settlement, or that he had in any manner violated the statute or the

proclamation of the President. This *prima facie* valid entry removed the land, temporarily at least, out of the public domain, and beyond the reach of other homestead entries. . . Generally, a homestead entry while it remains uncancelled withdraws the land from subsequent entry. Such has been the ruling of the Land Department. . . The entry of Gayman, though ineffectual to vest any rights in him, and, therefore, void as to him, was such an entry as prevented the acquisition of homestead rights by another until it had been set aside."

Following the adjudged cases, we hold that White's original entry was *prima facie* valid, that is, valid on the face of the record, and McMichael's entry, having been made at a time when White's entry remained uncancelled, or not relinquished, of record, conferred no right upon him, for the reason that White's entry, so long as it remained undisturbed, of record, had the effect to segregate the lands from the public domain and make them not subject to entry. Upon White's relinquishment they again became public lands, subject to the entry made by Murphy.

In addition, it may be observed that the action of the Land Department under the statutes relating to the public lands has been in line with the above views. This appears from the decision in *Hodges* v. *Colcord*, and from the opinion of the Secretary of the Interior in *McMichael* v. *Murphy*, 20 *L. D.* 147. It is our duty not to overrule the construction of a statute upon which the Land Department has uniformly proceeded, in its administration of the public lands, except for cogent reasons. *United States* v. *Johnston*, 124 *U. S.* 236; *United States* v. *Alabama G. S. R. Co.*, 142 *U. S.* 615; *United States* v. *Philbrick*, 120 *U. S.* 169; *United States* v. *Healey*, 160 *U. S.* 138, 141.

The judgment is *Affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S.